APPENDIX A

SUPREME COURT OF OHIO

2007-0114

[Filed May 2, 2007]

Cleveland Construction, Inc. Appellant/Cross-Appellee,	)
v.	)
City of Cincinnati, et al Appellees/Cross-Appellants.	)

Hamilton App. Nos. C-050749, C-050779, and C-050888, 2006 Ohio 6452, 864 N.E.2d 116. *Cleveland Constr., Inc. v. City of Cincinnati*, 2006 Ohio 6452, 864 N.E.2d 116, 2006 Ohio App. LEXIS 6410 (Ohio Ct. App., Hamilton County, 2006)

JUDGES: O'Donnell, J., would accept the appeal. Lanzinger, J., would accept the appeal. Pfeifer and Cupp, JJ., dissent.

OPINION:

APPEAL ACCEPTED FOR REVIEW

Discretionary appeal accepted on Proposition of Law Nos. I and III.

O'Donnell, J., would accept the appeal on Proposition of Law No. I only. Lanzinger, J., would accept the appeal on Proposition of Law No. III only. Pfeifer and Cupp, JJ., dissent.

APPENDIX B

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0114

APPEAL NO. C050749, APPEAL NO. C050779
APPEAL NO. C050888
(Consolidated)

[Filed January 22, 2007]

CITY OF CINCINNATI	)
Defendant-Appellant	)
	)
v.	)
	)
CLEVELAND CONSTRUCTION, INC.	)
Plaintiff-Appellee	)
	)

COURT OF APPEALS
FIRST APPELLATE DISTRICT
CASE NO. A-0402638

MEMORANDUM IN SUPPORT OF JURISDICTION OF
DEFENDANT-APPELLANT CITY OF CINCINNATI

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* * * * *

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-050749, C-050779, C-050888

[Filed January 18, 2007]

CLEVELAND CONSTRUCTION, INC.
Appellant/Cross-Appellee,

vs.

CITY OF CINCINNATI, et al.
Appellees/Cross-Appellants.

ENTRY GRANTING MOTION TO STRIKE APPLICATION FOR RECONSIDERATION

This cause came on to be considered upon the application of the appellees/cross-appellants for reconsideration, the motion of the appellant/cross-appellee to strike the application as untimely filed, and the response of appellees/cross-appellants to the motion to strike.

The Court finds that the motion to strike the application for reconsideration is well taken and is hereby granted.

To The Clerk:

Enter Upon the Journal of the Court on Jan 18 2007 per order of the Court.

By: /s/_____ (Copies sent to all counsel)
Acting Presiding Judge

APPENDIX D

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

CITY OF CINCINNATI,
Defendant-Appellee/
Cross-Appellant,

and

TIMOTHY RIORDAN,

BERNADINE FRANKLIN,

NATE MULLANEY

ALICIA TOWNSEND,

KATHI RANFORD,

and)
)
VALLEY INTERIOR SYSTEMS, INC.,)
Defendants-Appellees.)

JUDGMENT ENTRY

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and a) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 8, 2006 per Order of the Court.

By: /s/Hildebrandt
Presiding Judge

APPENDIX E

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-050749, C-050779, C-050888
TRIAL NO. A-0402638

[Filed December 8, 2006]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff-Appellant/
Cross-Appellee,

vs.

CITY OF CINCINNATI,
Defendant-Appellee/
Cross-Appellant,

and

TIMOTHY RIORDAN,

BERNADINE FRANKLIN,

NATE MULLANEY,

ALICIA TOWNSEND,

KATHI RANFORD,)
)
and)
)
VALLEY INTERIOR SYSTEMS, INC.,)
Defendants-Appellees.)
)

Civil Appeals From: Hamilton County Court of Common Pleas.

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded.

Date of Judgment Entry on Appeal: December 8, 2006

SYLVIA SIEVE HENDON, Judge.

OPINION

{¶1} This case arose from the city of Cincinnati's rejection of a bid by Cleveland Construction Co. for drywall work on the expansion and renovation of the Cincinnati Convention Center. At the heart of the dispute was the city's implementation of its small business enterprise (SBE) program.

{¶2} Cincinnati Municipal Code (CMC) 321-37 required the city to award a construction contract to the lowest and best bidder. The ordinance set forth a non-exhaustive list of factors that the city purchasing agent could consider in determining the lowest and best bid. One of the factors that could be considered was a contractor's compliance with the rules and

regulations of the city's SBE Subcontracting Outreach Program.[1]

{¶3} Where a lowest-and-best determination was based primarily on the contractor's subcontracting-outreach compliance, the ordinance had a built-in cap. The contract award could be made, "subject to the following limitation: the bid could not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."[2] The cap was apparently intended to strike a balance between the city's efforts to include small businesses in public contracts and the city's interest in protecting its taxpayers from excessive costs.

{¶4} On December 23, 2003, the city issued an invitation to bid on the Cincinnati Convention Center Expansion and Renovation Project, entitled "Bid Package C/TC-09A Drywall." The city required bidders to show that they had made a good-faith effort to obtain the participation of SBEs on the project. For the drywall-contract bids, the city established a mandatory SBE-participation goal of 35%. Bidders were notified that their failure to meet the SBE-participation goal could cause a bid to be rejected as nonresponsive. The city received bids until February 5, 2004.

{¶5} On February 11, 2004, Kathi Ranford, a contract-compliance officer, reported to Bernadine Franklin, the city's purchasing agent, that none of the three bidders for the project's drywall contract had complied with the 35% SBE-participation requirement. According to Ranford, Cleveland

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[1] CMC 321-37(c)(4).

[2] CMC 321-37(c).

had submitted a bid with 3% SBE participation, Valley Interior Systems had submitted a bid with 34% SBE participation, and Kite, Inc., had submitted a bid with no SBE participation. In that round of bidding, Cleveland's bid had been the lowest-dollar bid.

{¶6} Because none of the bidders had achieved the full 35% SBE-participation goal, the city conducted an emergency rebidding for the drywall contract. On February 24, 2004, Ranford notified Franklin that Cleveland had submitted a re-bid for $8,889,000, with 10% SBE participation, and that Valley had submitted a re-bid for $10,135,022, with 40% SBE participation.

{¶7} The city's office of contract compliance deemed Cleveland's bid to be unacceptable due to its failure to achieve 35% SBE participation. In all other respects, however, Cleveland's bid had been found acceptable according to the city's purchasing division.

{¶8} Following a review of the acceptability of the bids, Franklin issued a recommendation to Timothy Riordan, an assistant city manager, that the drywall contract be awarded to Valley. Franklin's recommendation stated, "Pursuant to Section 321-37 of the Municipal Code, the bid submitted by [Valley] has been determined to be the lowest and best bid."

{¶9} Valley's new bid exceeded Cleveland's new bid by $1,246,022, well over the $50,000 or 10% cap in CMC 321-37. Nonetheless, on March 3, 2004, the city awarded the drywall contract to Valley and instructed Valley to commence work under the terms of the contract.

Cleveland Files Suit

{¶10} Three weeks later, on March 30, 2004, Cleveland brought an action for injunctive relief and damages against the city, several city employees, and Valley. Cleveland asked the court to restrain the city and Valley from proceeding on the drywall contract and to order the city to award the contract to Cleveland.

{¶11} In addition, Cleveland sought declarations by the court that (1) the city's award of the contract violated CMC 321-37; (2) the city's drywall contract with Valley was void; (3) the city's SBE program was unconstitutional and in violation of Section 1983, Title 42, U.S.Code; (4) the city had deprived Cleveland of a property interest; (5) Cleveland was the lowest and best bidder; and (6) the city's delegation of discretion to its purchasing agent under the SBE subcontracting-outreach program was void.

{¶12} Finally, Cleveland sought compensatory and punitive damages, as well as attorney fees and costs.

{¶13} The trial court denied Cleveland's motion for a temporary restraining order. Later, upon motion, the trial court dismissed the city employees from the action.

{¶14} In June 2005, the case proceeded to a jury trial. At the close of Cleveland's case, the trial court directed a verdict in favor of the city and Valley on Cleveland's claims for lost profits. Cleveland's remaining claims for injunctive and declaratory relief and attorney fees were tried to the bench, by agreement of the parties.

{¶15} At the conclusion of the trial, the court found that the city had violated CMC 321-37 by awarding the drywall

contract to Valley rather than to Cleveland. As a result, the court held, the city had abused its discretion in a manner that had denied Cleveland the contract in violation of its federally protected due-process rights and in violation of Section 1983.

{¶16} The court held that the city's SBE program rules and guidelines created race- and gender-based classifications that rendered the program facially unconstitutional. The court further found that the city had pressured and encouraged bidders, including Cleveland, to draw upon race- and gender-based classifications, in violation of Cleveland's rights under Section 1983. But the court held that Cleveland had failed to establish that the denial of the drywall contract was the result of the race- and gender-based classifications; rather, it held that the denial had been the result of the city's preference for small businesses.

{¶17} The court rendered a declaratory judgment that precludes the city from awarding future contracts to a bidder that exceeds the cap set forth in CMC 321-37 if the bid selection is based primarily on the bidders' compliance with the SBE subcontracting-outreach program.

{¶18} The court permanently enjoined the city from maintaining or applying race-or gender-based classifications in its SBE rules and guidelines, absent a formal determination that such race-based provisions were narrowly tailored and necessary to fulfill compelling governmental interests, or that such gender-based provisions were substantially related to genuine and important governmental objectives.

{¶19} Finally, the court entered judgment in favor of Cleveland as the prevailing party, and against the city, for Cleveland's reasonable attorney fees and costs pursuant to

Section 1988, Title 42, U.S. Code. The court also entered judgment in favor of Valley.

{¶20} On appeal, Cleveland argues that the trial court erred by (1) directing a verdict in favor of the city on Cleveland's damage claims; (2) refusing to declare Valley's drywall contract to be void or to prohibit performance under the contract; (3) ruling that Cleveland could not elicit testimony from Valley's subcontractors with respect to post-contract events; (4) denying Cleveland's motion for a new trial; (5) granting the motions to dismiss individual city employees; and (6) making findings concerning causation of damages.

{¶21} In its cross-appeal, the city argues that the trial court (1) erred by applying CMC 321-37; (2) lacked jurisdiction over Cleveland's claims for injunctive relief; (3) erred by concluding that the city had deprived Cleveland of its right to procedural due process; (4) erred by ruling that portions of the city's SBE program created constitutionally impermissible race- and gender-based classifications; and (5) erred by awarding attorney fees to Cleveland. We first address the city's assignments of error.

The Application of CMC 321-37

{¶22} In its first assignment of error, the city argues that the trial court erred by applying CMC 321-37 in its analysis of Cleveland's claims. The city contends that Franklin had not applied the provisions of CMC 321-37 in her review of bids for the project because the ordinance had not been in place at the time the project's "procurement process" was planned.

{¶23} The record reflects that CMC 321-37 had been adopted in specific contemplation of the convention center

project. By its terms, the ordinance had been enacted as an emergency measure due to the city's "immediate need to proceed with the bidding of the Convention Center and major development projects." The ordinance specifically applied to the award of construction contracts that exceeded $100,000. And the ordinance had gone into effect before the project's bid solicitation, and well before the award of the drywall contract. So Franklin's selection of the lowest and best bidder was subject to CMC 321-37.

{¶24} The city argues that "[e]ven though Valley's bid was $1.2 million more than Cleveland's, the project was well within the budget." This argument fails to take into account that "among the purposes of competitive bidding legislation are the protection of the taxpayer [and the] prevention of excessive costs."[3] The fact that the project was under budget was of questionable relevance and was certainly not dispositive of the legality of the bid-selection process.

{¶25} The city argues that even if Franklin had applied CMC 321-37 to the drywall-contract bids, the ordinance's cap would not have come into play because Cleveland's bid was not an "otherwise qualified" bid. But the city acknowledges in its brief that "[t]he trial evidence established that Cleveland lost because its drywall bid failed to reserve at least 35% of the work for small business enterprises as the bid documents required." In other words, but for its SBE noncompliance, Cleveland's bid was qualified. Where the sole reason that Cleveland's bid was rejected was its noncompliance with the SBE subcontracting-outreach program, Cleveland was an "otherwise qualified" bidder. Under these circumstances,

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[3] *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgmt Dist.*, 73 Ohio St.3d 590, 602, 1995 Ohio 301, 653 N.E.2d 646.

Valley's SBE-compliant bid could not have exceeded Cleveland's bid by the $50,000 or 10% cap.

{¶26} Accordingly, we hold that the trial court properly considered and applied CMC 321-37. We overrule the city's first assignment of error.

Cleveland's Standing

{¶27} In its second assignment of error, the city argues that the trial court lacked jurisdiction over Cleveland's claims for injunctive relief. The city contends that the possibility that Cleveland might bid on a city contract in the future did not create a risk that it would again be subject to a deprivation of rights.

{¶28} In Ohio, it is well established that standing to challenge the constitutionality of a legislative enactment exists where a litigant "has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." [4]

{¶29} In the context of a constitutional challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, and not necessarily the loss of a contract. So to establish standing, a party challenging a set-aside program need only demonstrate that it

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[4] *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 1999 Ohio 123, 715 N.E.2d 1062.

is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis.[5]

{¶30} At trial, the city specifically stipulated that Cleveland intended and was able to bid on future city construction projects. And the city's discriminatory policies would have affected Cleveland's ability to compete fairly. So Cleveland had sufficient standing to seek injunctive relief against the city. We overrule the city's second assignment of error.

Deprivation of a Property Interest

{¶31} In its third assignment of error, the city argues that the trial court erred by concluding that the city had deprived Cleveland of a right to procedural due process.

{¶32} One of the proscriptions of the Fourteenth Amendment is the deprivation of a person's property interests without due process of law.[6] In a due-process challenge based upon such a deprivation, we must first determine whether a protected property interest was at stake.

{¶33} Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support

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[5] *Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. Jacksonville* (1993), 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586.

[6] *Bd. of Regents v. Roth* (1972), 408 U.S. 564, 569-570, 92 S. Ct. 2701, 33 L. Ed. 2d 548.

claims of entitlement to those benefits."[7] A person has a property interest in a benefit, such as a public contract, if the person has a legitimate claim of entitlement to it.[8] A person's unilateral expectation of a benefit is not enough.[9]

{¶34} The Sixth Circuit Court of Appeals has held that a disappointed bidder may establish a legitimate claim of entitlement to a public contract in one of two ways. A bidder can either show that it actually was awarded the contract and then deprived of it, or that the government abused its limited discretion in awarding the contract to another bidder.[10]

{¶35} Generally, municipalities are vested with broad discretion in matters related to public contracts. But that discretion is not limitless.[11] For example, a municipality "may by its actions commit itself to follow rules it has itself established."[12]

{¶36} In the context of lowest-and-best-bidder determinations, Ohio courts are reluctant to substitute their

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[7] *Id.* at 577, 92 S. Ct. 2701.

[8] *Cleveland Constr. v. Ohio Dept. of Admin. Servs., GSA* (1997), 121 Ohio App. 3d 372, 394, 700 N.E.2d 54.

[9] *Roth*, supra, at 577, 92 S. Ct. 2701.

[10] *United of Omaha Life Ins. Co. v. Solomon* (C.A.6, 1992), 960 F.2d 31, 34; *Enertech Elec. v. Mahoning County Commrs.* (C.A.6, 1996), 85 F.3d 257, 260.

[11] *Danis*, supra, at 604, 1995 Ohio 301, 653 N.E.2d 646.

[12] *Id.* at 603, 1995 Ohio 301, 653 N.E.2d 646.

judgment for that of city officials.[13] But where city officials abuse the discretion vested in them, courts will intervene.[14] An abuse of discretion "connotes more than an error of law or of judgment; it implies an unreasonable, arbitrary, or unconscionable attitude. * * * 'Arbitrary' means 'without adequate determining principle; * * * *not governed by any fixed rules or standard* .' * * * 'Unreasonable' means 'irrational.'"[15]

{¶37} In this case, the city had established a "fixed rule" with respect to the award of a contract based primarily upon the bidder's subcontracting-outreach program compliance. In that instance, CMC 321-37 required the city to apply the ordinance's cap.

{¶38} But, here, the evidence demonstrated that the city had arbitrarily ignored the cap in awarding the contract to Valley. Thus, we agree with the trial court that the city's failure to follow the directive of its own ordinance constituted an abuse of discretion that resulted in a deprivation of Cleveland's property interest in the contract award. We overrule the city's third assignment of error.

SBE Program Provisions Were Facially Unconstitutional

{¶39} In its fourth assignment of error, the city argues that the trial court erred by ruling that elements of the rules

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[13] *See Cedar Bay Constr., Inc. v. Fremont* (1990), 50 Ohio St.3d 19, 552 N.E.2d 202.

[14] *Id.* at 21-22, 552 N.E.2d 202.

[15] *Dayton, ex rel. Scandrick v. McGee* (1981), 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (emphasis added).

and guidelines in the city's SBE program created constitutionally impermissible race- and gender-based classifications. The city contends that the program was a lawful "outreach" program that encouraged contractors to use "good faith efforts" to promote opportunities for minorities and females.

{¶40} The Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments.[16] Racial classifications must serve a compelling government interest and must be narrowly tailored to further that interest.[17] Gender-based classifications, by contrast, require an "exceedingly persuasive" justification.[18]

{¶41} At trial, the city did not put forth any argument or evidence to demonstrate that its SBE program could withstand such heightened scrutiny. Instead, the city relied on its assertion that increased scrutiny should not apply in the first instance because its SBE program created neither race- nor gender-based classifications.

{¶42} On appeal, the city acknowledges that it had predetermined estimates of the availability of minorities and females for each trade represented in the convention center project. But the city argues that its availability estimates were

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[16] *Richmond v. J.A. Croson Co.* (1989), 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854.

[17] *Adarand Constructors v. Pena* (1995), 515 U.S. 200, 235, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

[18] *United States v. Virginia* (1996), 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735.

for informational purposes only, and that bidders were required to do nothing in response.

{¶43} Racial or gender classifications may arise from a regulation's strict requirements, such as mandated quotas or set-asides. But rigid mandates are not a prerequisite to a finding of a racial classification.[19] Where regulations pressure or encourage contractors to hire minority subcontractors, courts must apply strict scrutiny.[20]

{¶44} For example, in *Adarand Constructors v. Pena*,[21] the United States Supreme Court considered federal regulations that provided financial incentives to bidding contractors to hire minority subcontractors. The regulations did not require contractors to use minority subcontractors. But contractors would receive additional compensation if they did so. The court held that, to the extent that the regulations provided incentives to contractors to use race-based classifications, the regulations were subject to strict scrutiny.[22]

{¶45} In determining whether strict scrutiny must be applied to the city's SBE program, we must look behind its ostensibly neutral labels such as "outreach program" and "participation goals." The program's rules and guidelines

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[19] *Bras v. Calif. Pub. Utils. Comm.* (C.A.9, 1995), 59 F.3d 869.

[20] *See Lutheran Church-Missouri Synod v. FCC* (C.A.D.C., 1998), 332 U.S. App. D.C. 165, 154 F.3d 487; *Monterey Mechanical Co. v. Wilson* (C.A.9, 1997), 125 F.3d 702; *Safeco Ins. Co. of America v. White House* (C.A.6, 1999), 191 F.3d 675.

[21] (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

[22] *Id.* at 224, 115 S. Ct. 2097.

"are not immunized from scrutiny because they purport to establish 'goals' rather than 'quotas.'[Courts] look to the economic realities of the program rather than the label attached to it."[23]

{¶46} Under the city's SBE rules and guidelines, all bidders were required to use "good faith efforts" to promote opportunities for minority- and women-owned businesses (MBEs and WBEs) to the extent of their availability as determined by the city. With respect to the drywall portion of the project, the city estimated that the availability of MBEs was 13.09%, and that it was 1.05% for WBEs.

{¶47} Bidders were required to provide detailed descriptions of the techniques used to obtain participation of MBEs and WBEs. The city would then evaluate each bidder's documented efforts to achieve participation of MBEs and WBEs. If that review determined that a bid's utilization percentage for MBEs and WBEs was lower than the estimated availability for those groups, the bid would be flagged for a discrimination investigation.

{¶48} Where the city's SBE program required documentation of a bidder's specific efforts to achieve the participation of minority subcontractors to the extent of their availability as predetermined by the city, the program undeniably pressured bidders to implement racial preferences.[24] Therefore, the program's rules must be subject to strict scrutiny. To the extent that the rules pressured bidders to hire women-owned subcontractors, the city was

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[23] *Bras*, supra, at 874.

[24] *Safeco Inc.*, supra, at 692, citing *Lutheran*, supra, at 491.

required to demonstrate an "exceedingly persuasive" justification for the differential treatment.

{¶49} Given that the city effectively conceded that it could not justify race- or gender-based classifications under either standard of heightened scrutiny, the trial court properly determined that those elements of the program that caused bidders to use racial- or gender-based preferences were unconstitutionally impermissible.

Award of Attorney Fees

{¶50} In its fifth assignment of error, the city argues that the trial court erred by awarding attorney fees to Cleveland. The city contends that Cleveland was not entitled to the award because it was not a prevailing party.

{¶51} A "prevailing party" is one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[25] To be a "prevailing party," there must have been "a court-ordered 'change [in] the legal relationship'" between the parties.[26] In this regard, a declaratory judgment may serve as the basis for an award of attorney fees.[27]

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[25] *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S. Ct. 1933, 76 L. Ed. 2d 40.

[26] *Buckhannon Bd. v. W. Va. Dept. of Health & Human Res.* (2001), 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855.

[27] *Hewitt v. Helms* (1987), 482 U.S. 755, 761, 107 S. Ct. 2672, 96 L. Ed. 2d 654.

{¶52} But the entry of a declaratory judgment in a party's favor does not automatically render that party a prevailing party under Section 1988.[28] "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces-the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any other action. The real value of the judicial pronouncement - what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion - is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff* ." (Emphasis in original.)[29]

{¶53} We hold that the trial court did not abuse its discretion in ordering attorney fees. Cleveland successfully challenged the unconstitutional race- and gender-based provisions of the city's SBE program. As a result, the city will no longer be permitted to apply those provisions against Cleveland or other bidders on city contracts. In that regard, Cleveland was a prevailing party because the judgment had a distinct effect on the city's behavior. Accordingly, we overrule the city's fifth assignment of error.

Directed Verdict

{¶54} In its complaint, Cleveland sought damages for the loss of profits that it would have realized had it been awarded

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[28] *Rhodes v. Stewart* (1988), 488 U.S. 1, 109 S. Ct. 202, 102 L. Ed. 2d 1.

[29] *Hewitt*, supra, at 761, 107 S. Ct. 2672.

the drywall contract. Cleveland now argues in its first assignment of error that the trial court erred by directing a verdict in favor of the city on its lost-profits claim.

{¶55} In considering a motion for a directed verdict, a trial court must construe the evidence most strongly in favor of the party against whom the motion is made.[30] In doing so, if the court "finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."[31]

{¶56} "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence."[32] Because a question of law is presented, we apply a de novo standard of review to a directed verdict.[33]

{¶57} Cleveland acknowledges that the Ohio Supreme Court's recent decision in *Fairlawn v. Cementech*[34] resolves

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[30] Civ.R. 50(A)(4).

[31] Civ.R. 50(A)(4).

[32] *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002 Ohio 2842, 769 N.E.2d 835, ¶4, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896, paragraph three of the syllabus.

[33] *Cleveland Elec. Illum. Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 523, 1996 Ohio 298, 668 N.E.2d 889.

[34] 109 Ohio St.3d 475, 2006 Ohio 2991, 849 N.E.2d 24.

its claim for damages under state law. In *Cementech*, the court held that when a municipality violates competitive-bidding laws in awarding a competitively bid project, a disappointed bidder cannot recover its lost profits as damages.

{¶58} But in addition to its claim for damages under state law, Cleveland sought damages under federal law, Section 1983, Title 42, U.S.Code, for the city's deprivation of its property interest in the drywall contract. Under Section 1983, a party who has been deprived of a federal right under the color of state law may seek relief through "an action at law, suit in equity, or other proper proceeding for redress."

{¶59} The basic purpose of a Section 1983 damage award is to compensate persons for injuries caused by the deprivation of constitutional rights.[35] For this reason, no compensatory damages may be awarded in a Section 1983 suit without proof of actual injury.[36] The level of a person's compensatory damages under Section 1983 is ordinarily determined according to principles derived from the common law of torts.[37]

{¶60} In *Adarand Constructors v. Pena*,[38] the United States Supreme Court considered whether a rejected bidder had standing to seek injunctive relief against future application

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[35] *Carey v. Piphus* (1978), 435 U.S. 247, 253-254, 98 S. Ct. 1042, 55 L. Ed. 2d 252.

[36] *Memphis Community Sch. Dist. v. Stachura* (1986), 477 U.S. 299, 306, 106 S. Ct. 2537, 91 L. Ed. 2d 249.

[37] *Id.* at 306-307, 106 S. Ct. 2537.

[38] (1995), 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158.

of a minority set-aside program. In doing so, the Court presumed that the rejected bidder was entitled to seek damages for the lost contract:

{¶61} "Adarand, in addition to its general prayer for 'such other and further relief as to the Court seems just and equitable,' specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation classes. * * * Before reaching the merits of Adarand's challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand's allegation that it has lost a contract in the past because of a subcontractor compensation clause *of course entitles it to seek damages for the loss of that contract* [.]" (Emphasis added.)

{¶62} Those damages may include a disappointed bidder's lost profits.[39] In *W.H. Scott Constr. Co., Inc. v. Jackson,*[40] the Fifth Circuit Court of Appeals considered an equal-protection challenge to a policy encouraging minority participation in city construction projects. The court upheld an award of lost profits to a rejected bidder who had sought damages from the city under Section 1983.

{¶63} Similarly, in *Hershell Gill Consulting Engineers, Inc. v. Miami-Dade Cty.*, Fla.,[41] the court held that a county was liable to the plaintiffs under Section 1983 for any compensatory damages resulting from its unconstitutional affirmative-action programs. The court held that the plaintiffs'

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[39] *See Flores v. Pierce* (C.A.9, 1980), 617 F.2d 1386, 1392; *Chalmers v. Los Angeles* (C.A.9, 1985), 762 F.2d 753.

[40] (C.A.5, 1999), 199 F.3d 206.

[41] (S.D.Fla.2004), 333 F. Supp. 2d 1305.

damages could include their lost profits, but that the plaintiffs in that case had failed to prove that any actual losses had resulted from the unconstitutional programs.[42]

{¶64} In this case, the trial court concluded that Cleveland's failure to adduce evidence concerning the degree of completion of the drywall contract precluded Cleveland from proceeding on its claim for money damages. The court reasoned that Cleveland's damages were speculative, not due to a failure of proof as to Cleveland's anticipated profits, but due to the court's misapprehension that Cleveland's damage claim was wholly dependent on its claim for injunctive relief.

{¶65} Certainly, the status of the drywall project would have been relevant to a determination of any injunctive relief the court may have awarded, but that evidence was not critical to Cleveland's claim for Section 1983 damages. In effect, the trial court's entry of a directed verdict on the damage claim precluded Cleveland from seeking redress, even though Cleveland could have waited to file suit until the drywall contract had been completed. The issuance of a directed verdict on the issue of Section 1983 damages before the contract's completion had the absurd result of denying redress because of Cleveland's diligence in asserting its claims.

{¶66} We recognize that a plaintiff seeking redress under Section 1983 is required to mitigate its damages.[43] But once the plaintiff has presented evidence of damages, the defendant has the burden of establishing the plaintiff's failure

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[42] *Id.* at 1339.

[43] *Meyers v. Cincinnati* (C.A.6, 1994), 14 F.3d 1115, 1119.

to properly mitigate damages.[44] So once Cleveland presented evidence of damages, the burden of proof on the issue of mitigation was on the city.

{¶67} Because a jury could have concluded that Cleveland had established all the elements of its Section 1983 claim for damages, we hold that a directed verdict in favor of the city was unwarranted. Consequently, we sustain Cleveland's first assignment of error in part, reverse the entry of the directed verdict on the Section 1983 damage claim, and remand the case for a new trial on the issues of liability and damages with respect to Cleveland's lost-profits claim under Section 1983.

{¶68} Because Cleveland's fourth and sixth assignments of error relate to the trial court's dismissal of its damage claims, we address the assignments out of order. Cleveland argues that the trial court erred by denying its motion for a new trial, given the court's erroneous dismissal of its damage claim under Section 1983. Cleveland also contends that the trial court erred by making "a finding that, essentially, amount[ed] to a directed verdict on the issue of proximate causation of Cleveland's damages in addition to that given at trial." For the reasons set forth in our disposition of Cleveland's first assignment of error, we sustain the fourth and sixth assignments of error.

The Denial of Injunctive Relief

{¶69} In its second assignment of error, Cleveland argues that the trial court erred by refusing to declare the drywall

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[44] *Id.*, citing *Rasimas v. Michigan Dept. of Mental Health* (C.A.6, 1983), 714 F.2d 614.

contract unenforceable and by failing to enjoin performance of the contract. Cleveland contends that the trial court should have enjoined performance of the contract despite the fact that substantial work had been completed on the project.

{¶70} An appellate court need not consider an issue where the court becomes aware of an intervening event that has rendered the issue moot.[45] The duty of an appellate court is to decide actual controversies between parties and to render judgments that may be carried into effect.[46] "Thus, when circumstances prevent an appellate court from granting relief in a case, the mootness doctrine precludes consideration of those issues."[47] For example, in the context of appeals involving construction projects, Ohio courts have held that an appeal is rendered moot where the appellant fails to obtain a stay of execution of the trial court's judgment and construction commences.[48]

{¶71} In this case, there is no dispute that the convention center project, which was substantially completed at the time

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[45] *Cincinnati Gas & Elec. Co. v. PUC of Ohio*, 103 Ohio St.3d 398, 2004 Ohio 5466, 816 N.E.2d 238, at ¶15, citing *Miner v. Witt* (1910), 82 Ohio St. 237, 238, 92 N.E. 21, 8 Ohio L. Rep. 71.

[46] *Miner*, supra, at 238, 92 N.E. 21.

[47] *Schwab v. Lattimore*, 166 Ohio App. 3d 12, 2006 Ohio 1372, 848 N.E.2d 912, at ¶10.

[48] *Schuster v. Avon Lake*, 9th Dist. No. 03CA008271, 2003 Ohio 6587, at ¶3; *Pinkney v. Southwick Invs., L.L.C.*, 8th Dist. Nos. 85074 and 85075, 2005 Ohio 4167; *Bd. of Commrs. v. Saunders*, 2nd Dist. No. 18592, 2001 Ohio 1710; *Smola v. Legeza*, 11th Dist. No. 2004-A-0038, 2005 Ohio 7059; *Redmon v. City Council*, 10th Dist. No. 05AP-466, 2006 Ohio 2199.

that the trial court denied the injunction, is now completed in its entirety. At no point in the proceedings did Cleveland obtain a stay of the trial court's denial of its request for a temporary restraining order. In fact, as the trial court pointed out, Cleveland did not pursue preliminary injunctive relief for an entire year. Instead, Cleveland acceded to several continuances. In denying Cleveland's motion for a preliminary injunction, the trial court noted the following:

{¶72} "The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on [a] preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period - almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date - to pursue its preliminary injunction request."

{¶73} At this point, we can not render a judgment that could be carried into effect with respect to the performance of the drywall contract. Even if we concluded (which we expressly do not) that the trial court had erred in failing to enjoin the contract's performance, our opinion would only be advisory in nature. Consequently, we decline to address the assignment of error on its merits.

Evidentiary Rulings

{¶74} In its third assignment of error, Cleveland argues that the trial court erred by ruling that it could not elicit

testimony from Valley's subcontractors about events that had occurred after the city had awarded the contract to Valley. In support of its argument, Cleveland directs us to its examination of one of Valley's subcontractors, Marti Stouffer-Heis, owner of MS Construction Consultants.

{¶75} "Relevant evidence" is defined by Evid.R. 401 as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 402 provides that relevant evidence is admissible, subject to enumerated exceptions, and that evidence that is not relevant is not admissible. Although the terms of Evid.R. 402 are mandatory, a trial court is vested with broad discretion in determining whether evidence is relevant.[49] A reviewing court is, therefore, limited to a determination of whether the trial court abused its discretion in admitting or excluding the disputed evidence.[50]

{¶76} Cleveland's attorney attempted to elicit testimony from Stouffer-Heis about the city's post-award enforcement of its SBE program. Counsel asked whether Stouffer-Heis had been able to perform her described "[l]ogistics, project coordination" tasks at the construction site, and whether the city had performed any investigation upon submission of her request to be certified as an SBE supplier.

{¶77} The trial court indicated that it would allow testimony by a subcontractor with respect to the current status

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[49] *See Cincinnati v. Banks* (2001), 143 Ohio App. 3d 272, 287, 757 N.E.2d 1205; *Siuda v. Howard*, 1st Dist. Nos. C-000656 and C-000687, 2002 Ohio 2292, ¶25.

[50] *See Banks*, supra.

of the uncompleted project. And the court expressly permitted counsel to question Stouffer-Heis about whether she had been certified as an SBE supplier prior to the contract award. But the court instructed counsel to otherwise restrict his questioning to matters that had occurred prior to the contract award to Valley, because Cleveland's complaint had been predicated on the rejection of its bid.

{¶78} We find no abuse of discretion by the trial court in ruling that testimony related to post-award program enforcement was irrelevant and inadmissible. We overrule Cleveland's third assignment of error.

Dismissal of City Employees

{¶79} In its fifth assignment of error, Cleveland argues that the trial court erred when it granted the individual defendants' motion to dismiss. The trial court dismissed Cleveland's claims against city employees Riordan, Franklin, Mullaney, Townsend, and Ranford in their "personal and individual capacities," on the basis of qualified immunity. Cleveland had also sued the employees in their "official capacities." Because the trial court did not explicitly dismiss the claims against the employees in their official capacities, we treat the official-capacity claims as claims against the city.[51]

{¶80} The doctrine of qualified immunity generally shields public officials performing discretionary functions from liability for civil damages to the extent that their conduct

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[51] *See Asher Investments, Inc. v. Cincinnati* (1997), 122 Ohio App. 3d 126, 137, 701 N.E.2d 400; *Norwell v. Cincinnati* (1999), 133 Ohio App. 3d 790, 729 N.E.2d 1223.

does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.[52]

{¶81} The doctrine recognizes the strong public interest in protecting public officials from the costs of defending against claims. A public official's entitlement to avoid the burdens of litigation "is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."[53] To this end, a ruling on the issue of qualified immunity should be made as early as possible in the proceedings, before the commencement of discovery.[54] "[A] quick resolution of a qualified immunity claim is essential."[55]

{¶82} "Where a defendant official is entitled to qualified immunity, the plaintiff must plead facts which, if true, describe a violation of a clearly established statutory or constitutional right of which a reasonable public official, under an objective standard, would have known. The failure to so plead precludes a plaintiff from proceeding further, even from engaging in discovery, since the plaintiff has failed to

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[52] *Harlow v. Fitzgerald* (1982), 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396.

[53] *Mitchell v. Forsyth* (1985), 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411.

[54] *Id.*

[55] *Will v. Hallock* (2006), 546 U.S. 345, 126 S. Ct. 952, 960, 163 L. Ed. 2d 836.

allege acts that are outside the scope of the defendant's immunity."[56]

{¶83} In this case, Cleveland alleged that the city employees had violated its rights to due process and equal protection by failing to apply the cap in CMC 321-37 and by rejecting its bid as nonresponsive after applying provisions of a race-conscious program. These allegations were insufficient as a matter of law to describe a violation of a clearly established constitutional right. As demonstrated by the complex nature of the issues already discussed, the individual defendants could not have reasonably known that their actions were unconstitutional. Accordingly, we overrule Cleveland's fifth assignment of error.

Conclusion

In conclusion, we reverse the trial court's entry of a directed verdict on Cleveland's claim for lost profits under Section 1983. We remand the cause for a new trial on the issues of liability and damages under Section 1983. In all other respects, the trial court's judgment is affirmed.

Judgment accordingly.

HILDEBRANDT, P.J., and **PAINTER, J.**, concur.

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[56] *Salt Lick Bancorp v. FDIC* (May 30, 2006), C.A.6 No. 05-5291, ___ F.3d ___, 187 Fed. Appx. 428, citing *Kennedy v. Cleveland* (C.A.6, 1986), 797 F.2d 297, 299.

APPENDIX F

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[October 7, 2005]

Cleveland Construction, Inc.,
Plaintiff,

v.

City of Cincinnati, et al.,
Defendants.

ENTRY DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

This matter comes before the court on Plaintiff's motion for a new trial based on Plaintiff's position that "the Court's ruling dismissing Cleveland's damage remedy [relating to claimed lost profits and uncertain bid preparation costs] was error...." Plaintiff's motion for a new trial at 5. Plaintiff's position here clearly is not precluded by Plaintiff's earlier observation (in the fee award context) that: "As the Court (and the City) realize, cases where lost profits have been awarded in competitive bidding scenarios involving equal protection challenges are practically nonexistent. Most cases involving successful equal protection challenges to programs

such as the one at issue here result in relief of exactly the same nature as that granted here." Reply Memorandum in Support of Motion of Plaintiff for Award of Attorney Fees and Costs (August 22, 2005) at 7. Nonetheless, for reasons already set forth by the court, including those discussed in the court's post-trial entry of July 13, 2005, the court does not find Plaintiff's argument here well taken. The motion is denied.

SO ORDERED.

/s/ _____
Judge Nelson, Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202

APPENDIX G

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed August 29, 2005]

Cleveland Construction, Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

FINAL JUDGMENT ENTRY

This final judgment entry is based on and incorporates in full the court's post-trial entry of July 13, 2005.

As set forth in that prior entry, the court finds and adjudges that:

1) Defendant the City of Cincinnati ("the City") violated the requirements of Cincinnati Municipal Code Section 321-37 ("Bid; Award to Lowest and Best") in awarding the Convention Center drywall contract at issue to Defendant Valley Interior Systems, Inc. ("Valley") rather than to Plaintiff Cleveland

Construction, Inc. ("Cleveland Construction") when the award was "based primarily upon" compliance with the City's Subcontracting Outreach Program and Valley's bid exceeded Cleveland Construction's by $1,246,022.00. That additional cost exceeded the $50,000 cap established by Code Section 321-37, and the City acknowledged that Cleveland Construction was otherwise qualified to perform the work. In making its award, the City abused its discretion in a manner that harmed the public and denied Cleveland Construction the contract in violation of Cleveland Construction's federally protected due process rights and in violation of 42 U.S.C. Section 1983.

2) The City's Small Business Enterprise program Rules and Guidelines as in effect at the time of contract award and trial create race and gender based classifications for which the City claims no compelling governmental interest and offers no basis to satisfy any appropriate intermediate scrutiny review. The program is to that extent unconstitutional on its face. Further, in the process of soliciting bids in this matter, the City did pressure and encourage bidders, including Plaintiff, to draw upon race and sex-based classifications that the City concedes could not withstand the heightened level of review that the court finds mandated by governing law. The City in that regard violated Cleveland Construction's rights under 42 U.S.C. Section 1983. However, Cleveland Construction failed to establish that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract at issue.

Further, the court enters a declaratory judgment, in favor of Cleveland Construction and against the City, that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of the bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or fifty thousand dollars.

The court also enters a declaratory judgment, in favor of Cleveland Construction and against the City, that the City's SBE Rules and Guidelines as of the date of trial, and as promulgated by the City as official policy pursuant to City ordinance, contain race and sex based classifications that violate the equal protection clause of the United States Constitution.

The court also enters judgment against the City by permanent injunction prohibiting the City from maintaining or applying any iteration of the SBE Rules and Guidelines provisions specified at pages 13-14 of the court's July 13, 2005 post-trial entry, or any substantially comparable provisions making race or gender based classifications through similar formulations, absent a formal, public determination by the City establishing that such provisions are, in the case of racial classifications, narrowly tailored to advance a compelling governmental interest, or, in the case of gender classifications, substantially related to genuine and important governmental objectives. The court notes that the City acknowledged during this litigation that it was not in a position to make such showings. For the reasons set forth in its July 13, 2005 entry, the court does not enjoin drywall

work (well under progress at this stage) with regard to the Convention Center project.

The court also enters judgment in favor of Cleveland Construction, as the prevailing party and against the City, for its reasonable attorney fees and costs pursuant to 42 U.S.C. Section 1988, in the amount of $433,290.00. In arriving at that figure, the court has declined to award fees for certain preliminary and post-trial activities and for certain matters relating to potential expert witness testimony on matters not directly relevant to the issues presented to the court. The court has reviewed Cleveland Construction's fee application in light of prevailing standards (*see, e.g., Grycza v. Steger* [6th Dist. App. 1994], 97 Ohio App. 3d 82, 84 ["ordinarily a prevailing plaintiff should recover its attorneys fees"]; *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept Health and Human Resources* [2001], 532 U.S. 598; *Morscott, Inc. v. City of Cleveland* [6th Cir. 1991], 936 F.2d 271 [absent special circumstances, trial court "'must'" award fees to the prevailing plaintiff]), and with regard for the degree of success obtained through judicially enforceable remedies that alter the contemplated future legal relationship of the parties. The court does not find the City's memorandum in opposition to any fee award persuasive (including the City's less than full account of its shifting positions on whether its own Rules and Guidelines even had been formally promulgated, *cf.* City's May 11, 2005 brief at 13 arguing that the Rules and Guidelines as attached to Cleveland Construction's amended complaint "do not have the force of law" and are not "official policy" - a matter of significance to both prongs of Plaintiff's action).

Court costs as recorded by the Clerk of Courts are assessed to the Defendants to be shared equally between them. Although Valley's legal arguments did not prevail to the (very

considerable) extent that they mirrored the arguments of the City on those issues as to which the court awards judgment to Plaintiff Cleveland Construction against the City, the court awards no separate relief against Valley and enters judgment for Valley to that effect for the reasons stated in the July 13, 2005 post-trial entry.

This is a final order and there is no just cause for delay. The Clerk of Courts is directed to serve notice of this final judgment upon the parties in accordance with the civil rules.

SO ORDERED

/s/
Fred Nelson
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)

David Barth, 537 East Pete Rose Way, Suite 400, Cincinnati, OH 45202 (fax: 852-8222)

APPENDIX H

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO.: A040263

[Filed August 19, 2005]

CLEVELAND CONSTRUCTION, INC.,
Plaintiff,

- VS -

CITY OF CINCINNATI, et al.,
Defendants.

AGREED ENTRY

It is agreed by counsel for the City and Cleveland Construction Company that the hearing scheduled for August 19, 2005 at 1:30 p.m. for Cleveland's Motion for legal fees is hereby moved to a report hearing on August 26, 2005 at 2:30 p.m. as counsel has agreed to submit the issue on briefs to the Court. All other agreements and prior Orders or Entries stay in effect. Counsel for Cleveland Construction Company will submit its Reply Brief on or before August 22, 2005.

/s/
Judge Nelson

HAVE SEEN:

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/s/_____
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[Per Telephone Authorization of 8/19/05]
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APPENDIX I

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed August 11, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al, Defendants.	)

ENTRY

The Plaintiff issued a subpoena to Rendigs, Fry, Kiely & Dennis, L.L.P for billing records related to this litigation. The City of Cincinnati filed a Motion to Quash the subpoena. The Court, after carefully considering the matter, and after hearing arguments from counsel, made on August 4, 2005, grants the City of Cincinnati's Motion to Quash as expressed on the record of the hearing.

_____ /s/ _____
Date Judge Nelson

HAVE SEEN:

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APPENDIX J

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed July 20, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al, Defendants.	)

ENTRY

By agreement of the parties, a hearing on attorneys fees in this matter is established for August 9, 2005 at 3:00 p.m.. The parties request and agree that a final judgment entry be deferred until a result is reached on fees after that hearing. Plaintiff will file its Application for fees and costs by July 29, 2005, and serve Defendants in person or by telefax by that date. The City agrees to observe and abide by the injunctive restraint indicated in the Court's post-trial entry of July 13, 2005 pending final judgment entry. The fee hearing relates to a determination of Plaintiff's fees to be paid by the City.

/s/
Judge Fred Nelson

/s/Kelly Lundrigan for Plaintiff Cleveland Construction
Attorney (0059211)

/s/Leonard A. Weakley, Jr. atty for the City of Cincinnati
Attorney

/s/David L. Barth atty for Defendant Valley Interior
Systems, Inc.

APPENDIX K

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed July 13, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants	)

ENTRY

This matter proceeded to a trial on the merits of Plaintiff's case combined with an evidentiary hearing on Plaintiffs Motion for Preliminary Injunction pursuant to Civil Rule 65(B)(2) and under a schedule referenced in the court's May 13, 2005 Entry Denying Defendants' Motions for Summary Judgment and Denying Plaintiff's Motion for Partial Summary Judgment and [preliminary] Injunctive Relief [SJ Entry]. That prior entry sets forth in some detail the legal context of this action, which arises from a dispute relating to drywall work for the expansion and renovation of Cincinnati's Convention Center. A jury was impaneled to address certain issues in the case, after the court granted the motion of Defendant, the City

of Cincinnati, for a directed verdict with regard to Plaintiff, Cleveland Construction, Inc.'s, claim for lost profits, as referenced below, the parties agreed that the litigation should proceed as a trial to the court and the jury was discharged by the consent of all sides (a matter as to which Plaintiff subsequently took some issue). The trial now has concluded, and the court has heard the evidence and counsels' closing arguments and also has reviewed the final materials presented in writing.

I. The City violated its Code requirement, that a determination to award a City contract primarily on the basis of compliance with the City's Subcontractor Outreach Program (designed to favor subcontracting to small businesses), not cost taxpayers more than $50,000 .00 beyond the amount submitted in a lower and otherwise qualified bid.

The evidence is clear and the parties agree that in the determinative second round of bidding to perform the drywall work, the bid submitted by Plaintiff Cleveland Construction, Inc. ("Cleveland," or "Plaintiff") was lower by $1,246,022.00, than the bid submitted by Defendant, Valley Interior Systems, Inc ("Valley") Nonetheless, Defendant City of Cincinnati ("the City") awarded the drywall contract to Valley as the "lowest and best" bidder, because Valley agreed to subcontract at least 35% of the work to small business enterprises ("SBEs") while Cleveland did not. Defendants have maintained throughout this litigation that Plaintiff Cleveland was excluded from contract consideration because it failed to meet the City's SBE requirement. The evidence provides no indication of other infirmities in Cleveland's bid or capacity to perform the work, and the City previously had conceded that Cleveland was otherwise qualified to perform the work, *see* SJ Entry at 10. The court finds that the City's 35% SBE requirement was the only

reason that the City awarded the contract to Valley rather than to Cleveland, despite the one and a quarter million dollar difference between the bids.

The City's Code section 321-37, "Bid, Award to Lowest and Best," provides in part:

> "(a) Selection of Lowest and Best in Award of City Contracts. Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder ...
>
> (c) Factors to be Considered Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to [prior performance, prevailing wage history, compliance with nondiscrimination rules, and]
> *(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to section 323-31*
>
> *In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower,"* (emphasis added).

As the court noted in its SJ Entry, the language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is indeed selected "based primarily" on that factor, the City may proceed to award the contract "subject to the

following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower," 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor". The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis. As the court also observed in its SJ Entry at 15, the City Administration, through then Assistant City Manager Rashid Young, advised Cincinnati City Council's Law and Public Safety Committee prior to enactment of this 10%/$50,000.00 cap that, "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000.00 or less difference away from the lowest bid. We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid, and it doesn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." This explanation of a taxpayer protection rationale for the cap is fully consistent with the Code language that Cincinnati Council promptly adopted.

The 321-37(c) cap protecting Cincinnati taxpayers from having to pay more than $50,000.00 extra (extra, that is, beyond the amount established by a lower and otherwise qualified bid) for the benefit of SBE Subcontracting Outreach Program compliance was adopted in specific contemplation of the Convention Center project; it took effect only months before the contract at issue was awarded. *See* Plaintiff's trial

exhibit 13-A (noting that "this ordinance is an emergency measure. The reason for the emergency is the immediate need to proceed with the bidding of the Convention Center and major development projects, which may be impacted by Section 321-37 of the Cincinnati Municipal Code.")

The court parsed the language of 321-37 at some length in its SJ Entry (pages 10-23), and incorporates here that statutory construction. As earlier observed, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with 'SBE Subcontractor Outreach Program rules,' issued pursuant to 323-31 ['Subcontracting Outreach Program']" Code 321-37(c). (The Code's reference to program "rules" rather than to the program itself reflects a rather unusual drafting approach through which City Council adopted its Subcontracting Outreach Program simply by reference to a consultant's recommendations and through authorization of administratively promulgated rules in the absence of any further legislative definition of the Program Code 323-31.)

Until the eve of trial, the City had maintained that, despite the clear instruction of Code Section 323-31 requiring that the "City Manager shall issue rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program," the City had not formally promulgated its Small Business Enterprise Program Rules and Guidelines containing Subcontracting Outreach Program rules. *See, e.g.*, City's March 11, 2005 Memo Opposing Plaintiff's MSJ at 13. At trial, however, the City stipulated that the Small Business Enterprise Program Rules and Guidelines introduced as Plaintiff's exhibit 17 are what they purport to be and were, in fact, adopted as of April 1, 2003. Those Rules and Guidelines set forth at pages 4-22 the "Components of the [City's] SBE

Program," including (at 9-14) the "Subcontracting Outreach Program".

As established by the City, the "Subcontracting Outreach Program applies to City-funded construction contracts of $100,000.00 or more," *Id.* at 9. Further, the "Subcontracting Outreach Program requires bidders to make subcontracting opportunities available to a broad base of qualified subcontractors and achieve a minimum of 20% (which may be higher for construction of buildings) SBE subcontractor participation. *To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to qualified available SBE subcontractors," Id.* (emphasis added). *See also* Plaintiff's trial ex. 5, the "legislative recommendation" that City Council adopted by reference in establishing the SBE Subcontractor Outreach Program and in authorizing promulgation of rules and regulations therefore ("Failure to comply with the City's Subcontracting Outreach Program will cause a bid to be rejected Terms and conditions of this Subcontracting Outreach Program apply to City-funded construction projects of $100,000.00 or more"). Thus, the Subcontracting Outreach Program is a subset of the City's broader Small Business Enterprise Program, it applies to all City construction projects costing $100,000.00 or more, and it incorporates requirements that a certain "minimum percentage" of a bid go to qualified SBEs. With regard to covered projects, the Subcontracting Outreach Program establishes mechanisms for assuring a more firm particularized, and project-specific SBE requirement than the aspirational city-wide annual "goal" of 30% SBE participation set forth at Section 323-7 of the Code. *See also, e.g.,* trial testimony of City consultant Rodney Strong (mandatory aspect of Subcontracting Outreach Program minimum percentage requirements).

Having considered all of the evidence adduced, the court finds by clear and convincing evidence that the award of the contract at issue here was "based primarily" upon "information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued pursuant to section 323-31." Valley won the contract on re-bid because it exceeded the 35% SBE participation figure that the City established for this project under the SBE Subcontracting Outreach Program, while Cleveland did not. Plaintiff's trial exhibit 32, for example, is a City bid document issued to the bidders on this project and setting forth the applicable "SUBCONTRACTING OUTREACH PROGRAM SUMMARY." That program summary prominently featured the "SBE Goals Per Trade Contract Cincinnati Convention Center," establishing that "All bidders are required to meet the goal stated for the individual trade contract Drywall 35%." The Subcontracting Outreach Program, to the extent of its legislative formulation, was in place at the time of bid solicitation and the contract award (and was to be applied to construction contracts of $100,000.00 or more). *See also, e.g.*, Riordan trial testimony and Plaintiff's trial ex. 56 (1/21/03 memo contemplating application to Convention Center project of legislation containing Subcontracting Outreach Program authority). In place later, but also in effect by the time of bid solicitation and award, was the $50,000.00 taxpayer protection cap on the amount that the program could cost the City on any one contract -- and that limitation was part of a package enacted specifically in contemplation of the Convention Center project. That the cap was not in place during initial planning stages of the project does not obviate its mandate once enacted.

Thus, the court finds that the City did violate a specific prohibition of its own municipal Code in awarding the drywall

contract to Valley as the "lowest and best bidder" over Cleveland in order to favor small business enterprise subcontracting despite the additional cost to taxpayers of some $1,246,022.00 (an excess expenditure of $1,196,022.00 beyond what the 321-37 cap permits). Cincinnati's local rules limit the discretion of contracting officials in awarding such contracts where the officials purport to be determining the "lowest and best" bid. Where the City publicly determines that a lowest and best bid is not "in the best interest of the city," it may reject such a bid for that reason, *see e.g.,* Code 321-67, but the law requires that it do so plainly and openly (and for some legitimate, non-arbitrary reason, *see City of Dayton, ex rel Scandrick v. McGee* [1981], 67 Ohio St 2d 356). Where no such other rationale exists and the City purports to award a contract on the basis of the "lowest and best" bid, it is constrained by the standards it has established at 321-37, including the cost cap for awards where the lowest and best determination is based primarily on Subcontracting Outreach Program rules.

In determining whether the City abused its discretion under Ohio law and deprived Plaintiff Cleveland of a constitutionally protected property interest without due process of law by awarding the contract in a manner contrary to governing Code, the court refers to its discussion of the applicable legal standards from its SJ Entry: "'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment, it implies an unreasonable, arbitrary or unconscionable attitude.' 'Arbitrary' means 'without adequate determining principle, *** not governed by any fixed rules or standard'. 'Unreasonable' means 'irrational'" *Cedar Bay Construction, Inc. v. City of Fremont et al.,* 50 Ohio St. 3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party

is the 'lowest and best bidder.' [I]n the absence of evidence to the contrary, public officers [and] administrative officers, within the limits of the jurisdiction conferred by law, will be presumed not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion.'" *Id.* at 21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash* (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C.735.05], "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation, rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of officials as to whom the contract should be awarded," and that discretion was abused in depriving the bidder of the award, *Id.* at 394-95 (no abuse of discretion found), *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co Commissioners* (6th Cir. 1996), 85 F.3d 257, 260. ("A constitutionally protected property interest in a publicly bid contract can be demonstrated [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract', no

abuse of discretion found), *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local rules as to whom should be awarded the contract, then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate," no property interest where state guidelines were nonexhaustive), *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992), 960 F.2d 31, 34 ("Michigan law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"), *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete), *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"), *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found, "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

Having heard the evidence at trial, the court finds that the City did abuse its discretion in a manner that harmed the public and denied Cleveland the contract award, and that Cleveland did have a "legitimate claim of entitlement" sufficiently clear under the Code (with its 321-37 cost cap) to establish a due process violation. The City established a "fixed rule," in the language of *Cedar Bay,* that it then ignored when it awarded the contract to Valley based primarily on SBE attainment, despite the City Code's instruction that such SBE requirements should not cost the

taxpayers more than $50,000 per contract. *Cf. Greater Cincinnati Plumbing Contractors' Ass'n. v. City of Blue Ash* (1st Dist. App. 1995), 106 Ohio App. 3d 608, 614 ("Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its various forms'," quoting *Cedar Bay), Scandrick,* 67 Ohio St. 2d at 360. ("While municipal governing bodies are necessarily vested with wide discretion, such discretion is neither unlimited not unbridled. The presence of standards against which such discretion may be tested is essential, otherwise, the term 'abuse of discretion' would be meaningless"), *Mechanical Contractors Ass'n. of Cincinnati v. University of Cincinnati* (10th Dist. App. 2001), 141 Ohio App. 3d 333, 343 (public entitles should not be at liberty "to violate laws intended to benefit the public" in contracting), *Cementech,* 2005 WL 844948.

II. The City's Small Business Enterprise Program, as reviewed in light of its SBE Rules and Guidelines, contains elements that create race and gender based classifications for which the City claims no compelling governmental interest. The program is to that extent unconstitutional. As applied in this case, however, those unconstitutional elements did not cause Cleveland to lose the contract award, rather, Valley was awarded the contract because of its higher SBE subcontracting percentage as calculated without regard to race or gender.

Plaintiff asserts and the City concedes that Plaintiff intends and is positioned to bid on future City contracts and that it has standing to mount an equal protection clause challenge to the City's SBE program as that program currently is constituted.

Very significantly to this assessment, the City has stipulated that it lacks the necessary factual basis to withstand any "strict scrutiny" review of its SBE program. If any part of the SBE program must comply with strict scrutiny standards in order to survive constitutional challenge, the City agrees that such elements must be invalidated as unconstitutional at this time. That is, the City concedes that it is not in a position to prove any "compelling governmental interests" that could sustain a racial classification program no matter how "narrowly tailored." The City also has failed to present or argue any significant evidence showing that its program could satisfy any "intermediate scrutiny" review.

Justice O'Connor has set forth the determination by the United States Supreme Court that ..."the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments," *Adarand Constructors, Inc. v. Pena* (1995), 515 U.S. 200, 222, citing *Richmond v J.A. Croson Co.* (1989), 488 U.S. 469. "'A free people whose restitutions are founded upon the doctrine of equality' should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests," *Id.* at 227, *see also, e.g., Grutter v. Bollinger* (2003), 539 U.S. 306, 326 (strict scrutiny required for all governmentally imposed racial classifications), *Monterey Mech Co. v. Wilson,* 125 F.3d 702, 713 (9th Cir. 1997)("burden of justifying different treatment by ethnicity or sex is always on the government"). Given the City's stipulations on standing and strict scrutiny, the court is

required to examine whether the City's SBE program imposes classifications subject to such heightened review.

Plaintiff points to nothing in the Constitution or laws of the United States or of the State of Ohio that creates a heightened standard of judicial review for a governmental program that simply favors small business enterprises at the expense of larger competitors. The issue here is not classification by size, but rather by race or gender.

Further, the law does not prohibit governmental entities from recording statistics relating to race or gender, or from tracking the progress of groups as identified by such categories, or from seeking to ascertain whether any impermissible, discriminatory barriers are hampering the advancement of individuals within groups as defined by race or gender. Thus, for example, the fact that the City reviews statistics relating to contract awards to Minority Business Enterprises ("MBEs," as defined at 323-1-M) or Women's Business Enterprises ("WBEs," as defined at 323-1-W) pursuant to 323-17 ("City Maintained Records and Reports") itself does not establish a requirement of heightened scrutiny. *See, e.g., Croson,* 488 U.S. at 492 (plurality op. of O'Connor, J.) ("a state or local subdivision has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction ... and can use its spending powers to remedy private discrimination, if it identifies that discrimination with the particularity required by the Fourteenth Amendment"). Even the identification of specified "MBE/WBE annual participation goals," to be used in conjunction with "monitor[ing], track[ing], and report[ing]" purposes alone, as set forth in 323-7(a), without further mechanism to promote or effectuate or encourage others to meet such goals in any particular context, may not threaten cognizable injury to this Plaintiff. *Cf. Safeco Ins. Co. v. City*

of White House, Tenn. (6th Cir. 1999), 191 F.3d 675, 690, 692 (cited in filings made by both parties and in City's proposed jury instructions) ("Outreach efforts may or may not require strict scrutiny," citing authority for proposition that such scrutiny generally does not apply to outreach efforts targeting particular race).

However, "where 'outreach' requirements operate as a *sub rosa* racial preference - that is, where their administration 'indisputably pressures' contractors to hire minority subcontractors — courts must apply strict scrutiny" *Safeco,* 191 F.3d at 692. The City's Small Business Enterprise Program Rules and Guidelines, disavowed by the City as unofficial until the eve of trial and then acknowledged as formally promulgated as of April 1, 2003, *see* Plaintiff's trial exhibit 17, contain a number of such elements when reviewed as a complete program. The City's Rules and Guidelines state, for example, that:

1) "all bidders are required to use good faith efforts to promote opportunities for Women and Business Enterprises to participate in *to the extent of their [governmentally specified] availability,* contracting. Prior to the award of any contract related to construction services or professional services, the City shall evaluate each bidder's documented efforts to achieve the participation of minority and women business enterprise firms." Rules and Guidelines, Plaintiff's trial exhibit 17, at 5 (emphasis added), *cf. Virdi v. Dekalb Co School Dist* (11th Cir. 2005), 2005 WL 1389942 (nonbinding "goals" for "minority vendor involvement" linked to specific notice and advertising outreach programs are racial classifications subject to strict scrutiny).

2) "Upon its successful completion, the Non-Discrimination Program [component of the SBE program] will result in utilization of minority and women owned firms *to the extent of their [governmentally specified] availability*." Rules and Guidelines at 6 (emphasis added).

3) "The City will evaluate efforts made by bidders to promote opportunities for minority and women owned firms to compete for business as subcontractors and/or material or equipment suppliers at the time of bidding. If the evaluation determines that a bidder has failed to *achieve* levels of minority and women business enterprise *participation* as might be reasonable on the basis of objective data regarding availability and capacity of such business, the bidder shall be subject to an inquiry by the Office of Contract Compliance." *Id.* at 6 (emphasis added), *cf. MD/DC/DE Broadcasters Assn. v. Fed. Communications Com.* (D.C. Cir. 2001), 236 F.3d 13 (potential investigation of recruitment efforts based on applicant pool numbers is a "powerful threat" giving rise to strict scrutiny review).

4) "Bidders [operating under the Subcontracting Outreach Program] should be able to include the participation of minority and female firms at the levels of availability determined in the City of Cincinnati Disparity Study. "Rules and Guidelines at 9 (referencing a study that the City concedes does not reflect a compelling governmental interest in pursuing a program of racial classification).

5) "[Using form 2007,] [o]fferor will provide a detailed description of the techniques used to obtain

participation of minority and women owned business enterprise ... " *Id.* at 43.

6) "Utilizing the bidder's utilization form (Form 2003) and total bid amount, the actual utilization percentage is calculated. This is accomplished by taking the amount of the subcontracts awarded to minority and women-owned businesses and dividing by the total bid amount If this amount is equal to the estimated availability, then no further inquiry is needed. If the actual utilization is less than the estimate, then further inquiry is warranted. The contract administrator must look at the bidder's solicitation form and contact the minority and women-owned businesses listed on the form to verify that they were contacted by the bidder and what their response was. The administrator must also review the good faith efforts taken by the bidder. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual [government specified] availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." *Id.* at 46; *cf. MD/DC/DE Broadcasters, supra.*

7) [From the "Pre-bid/Outreach Session Script for Contract Administrator"] "Bidders are required to show that they've made a good faith effort to get the *maximum practical participation* of minority and women-owned businesses on this project. [I]f it is feasible that the work can be broken into two or more smaller units, then it should be done so as to permit

maximum participation, based on the availability estimate." Rules and Guidelines at 49 (emphasis added).

8) Every bidder is to submit a "Statement of Good Faith Efforts" certifying that, "we have utilized the following methods to obtain the *maximum practicable participation* by small, minority and women-owned business enterprises on this project." *Id.* at Form 2007 (emphasis added).

As constituted, therefore, to include the officially promulgated Rules and Guidelines authorized and required by Code 323-5, the City's Small Business Enterprise Program contains a variety of elements through which the City makes classifications by race and sex and "indisputably pressures" contractors to recruit and use subcontractors on those terms. This case is different from many other cases involving government race and sex classifications in that the City advances no evidence to suggest that these elements of its program could withstand the heightened scrutiny applied under U.S. Supreme Court precedents. The constitutional inquiry is foreshortened because the City concedes that it cannot satisfy any strict scrutiny review of its program. Thus, the program is unconstitutional on its face to the extent that the City engages in classification by race or sex with regard to City contracting in construction projects. To that extent, as identified above, Plaintiff prevails on its facial challenge under 42 U.S.C. Section 1983.

With regard to the application of those unconstitutional program elements to the facts of this case, the court notes that there is no evidence that any bidder on the contract at issue was privy to the Rules and Guidelines document itself. The court further notes, however, that both Cleveland and Valley

did, in fact, (and without protest by Cleveland until after the contract was awarded to Valley) submit form 2007 ("Statement of Good Faith Efforts") certifying their efforts "to obtain the maximum practicable participation by small, minority and women-owned business enterprises on this project." *See, e.g.,* Plaintiff's trial ex. 28. Those certifications were made after all bidders were provided the "Subcontracting Outreach Program Summary" sheet for the project that included this directive from the City. "You will also find on the cover of this bid document an Availability Determination [of "13.09% Minority /1.05% Female" for the drywall work, *see* Availability Estimation Sheet at Plaintiff's trial ex. 28]. These figures are percentages based on a review of the City's vendor list and certified minority and women-owned businesses.

Bidders should be able to include minority and female firms at the level of availability indicated." Plaintiff's trial exhibit 32 (emphasis added). The City also informed bidders through Addendum 3 to the bid documents that "If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive However, we expect the utilization of SBEs to be reflective of the availability estimates." *See* Plaintiff's trial exhibit 70.

Thus, in the process of soliciting bids, the City did in those respects pressure and encourage bidders to draw upon race and sex-based classifications that the City concedes could not withstand any appropriate heightened review on the facts to which the City is privy. The trial elicited no testimony, however, that the City in fact gave weight to bidders' compliance with MBE or WBE availability estimates in making the contract award with regard to subcontracting percentages, Plaintiff failed to establish that City officials looked beyond whether drywall bidders met the City's 35%

SBE requirement. Indeed, Plaintiff's own chief estimator on the project did testify that in seeking to gain the contract award, his focus in this area was on boosting his company's small business enterprise inclusion rate, and not on attaining any particular MBE or WBE percentages. Valley did not meet the specified WBE percentage, and no evidence was presented at trial that the City rejected any Convention Center bid on the basis of MBE or WBE availability estimates. The evidence indicates that the City awarded the contract to Valley, and not to Cleveland, because Valley's bid complied with the City's requirement that 35 percent of the work go to small business enterprises and Cleveland's bid did not.

With regard to the unlawful discrimination component of the case, therefore, Plaintiff here is much in the posture of the plaintiff in the case that it cites of *Virdi v. Dekalb County School District* (11th Cir. 2005), 2005 WL 1389942. There, the federal court of appeals determined that a school district's aspirational "goals" for minority involvement in contracting, coupled with specific mechanisms for public outreach, created racial classifications that were not narrowly tailored to meet strict scrutiny review, "the program is facially unconstitutional." The court held that, "[n]evertheless, the District is still entitled to judgment on Virdi's intentional discrimination claim While the [program's] goals themselves are unconstitutional, they do not constitute evidence that Virdi himself was discriminated against. Virdi has failed to establish a causal connection between the unconstitutional aspect of the [program] and his alleged injury. Moreover, there is insufficient other evidence to impose liability upon the District for damages to Virdi for intentional discrimination." Similarly here, Cleveland has not established that the City's race and sex based classifications (as opposed to the City's small business preference) resulted in the loss of the contract

award. *Cf. Florida General Contractors v. Jacksonville* (1993), 508 U.S. 656 (traceability requirement).

Nor has Plaintiff met its burden of proof to establish that the City's stated policy to favor small businesses (to the extent that the practice does not cost taxpayers more than $50,000.00 per major construction contract) is in reality a sham to mask invidious discrimination. The court notes as an aside that the City's policy of encouraging small business participation well predates the Subcontracting Outreach Program components of which Plaintiff complains. Further, the court observes that Cincinnati's City Council, at the urging of the Administration, has indeed opted to limit application of Subcontracting Outreach Program small business preferences to circumstances in which such preferences would not add more than $50,000.00 to the cost of a contract. While that newly enacted taxpayer protection cap was not observed in this instance, the evidence does not establish that the provision was ignored as part of a scheme to further race or sex based distinctions, and the fact that the cap was adopted by Code certainly does not further the intentional discrimination theory. Moreover, for example, the City's rejection of all the initial drywall bids, including Valley's, does not bolster the theory that the City's stated preference for SBEs was used here as a "sham" to mask improper considerations of race or sex. Further still, evidence was adduced that the City did award other contracts on the Convention Center project to bidders who did not include any MBE or WBE participation.

In short, Plaintiff has demonstrated that the City's SBE program contains certain race and sex based classifications that cannot pass constitutional muster as constituted at this time; Plaintiff has not established, however, that those aspects of the program caused Plaintiff to lose award of the drywall

contract at issue in this case. *Cf. Texas v. Lesage,* 528 U.S.18 (1999) ("where a plaintiff challenges a discrete governmental decision as being based on an impermissible criterion and it is undisputed that the government would have made the same decision regardless, there is no cognizable injury warranting relief under [Section] 1983" on an 'as applied' challenge).

III. Having prevailed on its abuse of discretion/due process Section 1983 claims and on its claim that specific portions of the City's SBE Rules and Guidelines are unconstitutional on their face, Cleveland is entitled to certain declaratory and injunctive relief. Cleveland also is entitled to its reasonable attorney's fees under 42 U.S.C. Section 1988. Cleveland did not establish, however, that the court should use its equitable powers to enjoin ongoing work with regard to the Convention Center project itself.

The injunctive and declaratory relief sought by Cleveland involve both the administration of future City construction contracts and the disposition of the current Convention Center drywall project.

Plaintiff is entitled to a declaration that City Code Section 321-37(c) in its current form provides, among other things, that where the City elects to enter into a construction contract on the basis of the "lowest and best" bid, and where that selection is based primarily upon the City's determination of bidders' relative compliance with the City's SBE Subcontracting Outreach Program rules and regulations, the City may not award the contract to a bidder whose bid amount exceeds an otherwise qualified bid by ten percent or Fifty Thousand Dollars. The City Administration professed to know the meaning of that Code subsection at the time it was considered by Council; the court trusts that now that further attention has been drawn to the existence of the subsection

(and to the high cost to taxpayers of ignoring it), and now that the City has acknowledged the status of its Subcontracting Outreach Program rules and regulations, no injunctive mandate with regard to future contracts is necessary with regard to that provision of law. Plaintiff Cleveland further is entitled to a declaration that the conduct of the City in ignoring the cost cap de rived Cleveland of a property interest without due process of law.

Plaintiff also is entitled to a declaration that the City's SBE Rules and Guidelines in their current form contain certain race and sex based classifications as enumerated above that, in light of the City's admission that it cannot now offer a compelling governmental interest to satisfy "strict scrutiny" review as required by governing United States Supreme Court precedent, violate the equal protection clause of the U.S. Constitution. The court will enjoin the City from applying those specified Rules and Guidelines provisions to any City construction project absent a formal determination and public showing by the City that such provisions are narrowly tailored to advance a compelling governmental interest of the sort that the City concedes it cannot now establish. Now that the City has acknowledged the status of its Rules and Guidelines, and now that these particular classifications have been identified, and the City has conceded that it is unable to meet any strict scrutiny review, the City is expected to take prompt steps to remove all unconstitutional provisions from its Rules and Guidelines. In this regard, the court is heartened by the City's stated commitment in the Rules and Guidelines (at page 8) to ensure that, "Businesses awarded City contracts shall prohibit discrimination against any person or business on the basis of race, color, sex, religion, disability or national origin. Such businesses shall develop a policy statement to be communicated regularly to all persons and entities involved in the performance of their contracts, and shall conduct their

contracting and purchasing programs so as to discourage any discrimination and to resolve all allegations of discrimination."

In considering Cleveland's request for injunctive relief with regard to the Convention Center drywall contract at issue, the court is mindful that, "A party seeking a permanent injunction must show [that it has 'a right to relief under the applicable substantive law,'] that the injunction is necessary to prevent irreparable harm and that the party does not have an adequate remedy at law. [Such] party must ordinarily prove the required elements by clear and convincing evidence" *Procter & Gamble Co. v. Stoneham* (1st Dist. App. 2000), 140 Ohio App. 3d 260, 267. The merits of Cleveland's claims, including its showing that the City abused its discretion in disregarding the $50,000.00 cost cap under Code Section 321-37, have been discussed above.

Regarding the question of an adequate remedy at law, the court observes that the Defendants' consistent position up to and into trial was that Plaintiff is limited in this action solely to its requests for injunctive and declaratory relief, and that money damages are not an appropriate remedy for Plaintiff's claims. *See, e.g.,* City's May 27, 2005 pretrial statement at 2 ("The City also challenges Cleveland's ability to recover its alleged 'lost profits'"), City's Motion in Limine to Preclude Plaintiff from Presenting Evidence of Lost Profits; City's June 13, 2005 Reply to Response to the Motion in Limine Regarding Lost Profits ("Because Cleveland's only claim is for injunctive relief, Cleveland also is not entitled to a jury trial. Cleveland's constitutional rights, and any claim for redress, can be handled through an action in equity by filing and seeking injunctive relief. Not only does an action for injunctive relief protect Cleveland, but it also protects the taxpayers from having to pay twice for a public project"),

City's June 20, 2005 Memorandum Citing Additional Authority on the Recovery of Lost Profits ("in Ohio lost profits are not available and only injunctive relief available to the plaintiff").

The court agreed with the City that lost profits are not a remedy available under Ohio law to a disappointed bidder on a public contract *See, e.g., O'Rourke Construction Co. v. Cincinnati Metropolitan Housing Authority* (1st Dist. App. 1982), 1982 WL 8613 at n.5 ("We can find no award of damages from public funds even though the contract was given to another bidder as the result of abuse of discretion."); *Hardrives Paving & Constr., Inc. v. Niles* (1994), 99 Ohio App. 3d 243, 247-48 ("The fact that injunctive relief is available generally indicates that a monetary award is not available for lost profits. [I]f we were to allow appellant to receive monetary damages, only the bidders would be protected because the public would have to pay the contract price of the successful bidder plus the lost profits of an aggrieved bidder. However, if injunction is the sole remedy, both the public and the bidders themselves are protected."), *Cavanaugh Bldg. Corp. v. Cuyahoga Cty. Bd. Of Commrs.* (8th Dist. App. 2000), 2000 WL 86554. The court disagreed with the City's proposition, however, that it "must apply state law for purposes of defining the scope of damages under [federal Section] 1983," *cf.* City's June 16, 2005 Motion to Clarify at 2, and concluded that violations of federal law under Section 1983 can give rise to money damages including lost profits where injunctive relief alone would not make a plaintiff whole. *See, e.g., Carey v. Piphus* (1978), 435 U.S. 247, 257-58 ("damages awards under Section 1983 should be governed by the principle of compensation" as developed by the common law of torts, where common law does not provide full compensation, "the task will be the more difficult one of adapting common-law rules of damages to provide fair

compensation for injuries caused by the deprivation of a constitutional right.").

The City's newly adopted assertion at closing that project-specific injunctive relief is precluded because Plaintiff had a complete damages remedy available at law thus rings a bit hollow The court granted a directed verdict for the City on the lost profits issue because Plaintiff - which consistently had sought a combination of money damages and injunctive relief, including project-specific injunctive relief, *see, e.g.*, Amended Complaint and Plaintiff's May 27, 2005 pretrial statement at 2 (seeking remedies including damages, declaratory relief, and "injunctive relief against the City and Valley with regard to the application of the SBE Program to the award of the drywall contract at issue") - failed in its case in chief to provide any evidence whatsoever with regard to the drywall project status or the potential availability of injunctive relief on any balance of the contract, at the close of Plaintiff's case, therefore, there was no factual basis on which assess available damage remedies or on which to instruct the jury to calculate any lost profits for drywall work already completed. *See, e.g.*, Ohio cases *supra* establishing precedence of injunctive relief as opposed to money damages in public bid contracts, *see also, e.g., Milwaukee Co. Pavers Assn. v. Fiedler* (W.D. Wisc. 1989), 707 F. Supp. 1016, 1032 (lawsuit challenging "disadvantaged business" preference in construction contracts. "Plaintiffs would be entitled to money damages [for the alleged federal constitutional violations] *only if* their motion for a preliminary injunction were denied, they were to succeed ultimately on the merits of their claim, *and the state construction projects were to have proceeded so far that they could not reasonably be re-let under non-discriminatory bidding conditions,"* [emphasis added]). The court did not rule and does not find that Plaintiff had available a fully adequate remedy at law. It

is true that no evidence as to the current status of the drywall work (and as to whether there remains any significant portion of that drywall project left for potential injunction) was presented until the City and Valley put forward proof on that subject as part of their defense cases; such evidence now is before the court, however, for any appropriate consideration.

In light of the equitable nature of the remedy sought, and especially given the public nature of the project at issue, the court also should consider whether the public interest would be served or harmed by an injunction and whether third parties would be unduly injured by such a remedy. "[C]aution should be exercised in granting injunctions, and especially so in cases affecting a public interest where the court is asked to interfere with or suspend the operation of important public works or to control the action of another department of government." *White v. Long* (1st Dist. App. 1967), 12 Ohio App. 2d 136, 140, *see also, e.g., Leaseway Centers v. Dept. of Adm. Serv.* (10th Dist. App. 1988), 49 Ohio App. 3d 99, 106 (quoting *White), Cleveland Construction, Inc. v. Ohio Dep't. of Adm. Serv.* (10th Dist. App. 1997), 121 Ohio App. 3d 372, 383 (same).

Certainly there is a powerful public interest in requiring governmental entities to follow the law. Courts across this state have found that interest especially strong in the context of "protecting the integrity of the [public] bidding process." *Cf. Cementech,* 2005 WL 844948 (9th Dist. App.) (noting that where available, "the preferred method of resolving bidding disputes is injunctive relief, as that relief would prevent double payment [for the same project] and better serve the integrity of the bidding process"), *Hardrives Paving,* 99 Ohio App. 3d at 247-48 ("if injunction is the sole remedy, both the public and the bidder themselves are protected"), *Cedar Bay,* 50 Ohio St. 3d at 21 ("The intent of competitive bidding,

under either the state statutes or a municipal charter, is 'to provide for open and honest competition in bidding for public contracts and to save the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms.").

Against such considerations the court weighs the potential harm to the public that could be caused by disruption of the ongoing Convention Center work. Defense witnesses testified that the Convention Center project as a whole is approximately sixty percent complete. The drywall work will be roughly 50 percent done by the end of July and is on a "critical path" in which delays could significantly affect other parts of the project. Defendants argue, in effect, that the savings that the City might obtain if it were ordered to shift the remaining drywall work from Valley to Cleveland at Cleveland's bid price are likely to be surpassed by additional costs arising from delay claims and lost Convention Center business. *See, e.g.*, McKillup testimony that potential delay claims could reach into the millions of dollars). Although Defendants couple this argument with the contention that Cleveland delayed unduly in seeking to press its preliminary injunction claim, thereby allowing the project to reach a more delicate juncture, the court is constrained to note that the City seems to have contributed to any perceived need for extensive and lengthy discovery by taking positions such as its longstanding denial, only now abandoned, that it had not officially promulgated SBE Rules and Guidelines at all.

Valley is prepared to perform the balance of the drywall work and, with its subcontractors, would lose any expected remaining profits if the project is enjoined. Valley also presented testimony that a premature end to its contract would mean a loss of work for certain employees in light of the additional worker contingent recently added to the endeavor.

Against that very real concern, the court notes that Valley would not have won the contract or been paid for *any* of the work had the contract been awarded in keeping with the $50,000.00 cost cap, and that Valley and its subcontractors appear to have been well compensated for the work they have performed relative to the significantly lower (and "otherwise qualified") bid submitted by Cleveland.

The court finds that equity would not be served by Cleveland's proposal that Valley be made to disgorge money it already has earned for work already done. Testimony at trial indicates that Valley followed the rules set forth by the City in bidding on the contract, and that it has borne substantial contractual risks associated with its undertaking. The court does not deem Valley's contract with the City void *ab initio,* and it would be inequitable to strip Valley of the compensation it has been given for the work it has undertaken pursuant to contract.

Further, Cleveland provided no testimony whatsoever during its case in chief either with regard to the current status of the Convention Center project or with regard to Cleveland's own current ability to complete the work without delay and disruption to a major City undertaking. On rebuttal, Cleveland offered no testimony to dispute Defendants' position that the Convention Center drywall work is on a "critical path" that is extremely time-sensitive and as to which disruptions would impede other contractors and interfere with planned Convention Center events and broader City interests surrounding the City's economic development program. Cleveland did not offer credible assurances by a witness conversant with the scope of work and the project's current status that Cleveland could take over the job at this stage without undue and costly disruption. The court continues to believe that a Plaintiff in an action of this nature is not entitled

to manufacture heightened claims to lost profits by eschewing serious efforts toward injunctive relief at any stage in the process.

Considering the testimony that was given, including the rebuttal testimony, the court finds that an injunction interfering with the ongoing Convention Center construction work has not been shown to be appropriate upon examination of all appropriate equitable considerations. The court reaches this conclusion reluctantly in light of the course that this litigation took, but it finds that the public interest is a weighty factor in this case involving a major public undertaking, *see, e.g., White,* 12 Ohio App. 2d 136, and that the public interest at this juncture is best served by the combination of declaratory and non-project specific relief outlined above. The court further finds that Cleveland is the prevailing party on its Section 1983 due process claim and on its reasonable attorney's fee under 42 U.S.C. Section 1988. Costs will be assessed against Defendants jointly.

The court will ask the parties to confer, if they wish, on a judgment entry to propose to the court in very short order reflecting these determinations. The court also asks the parties to confer on a date for a hearing on the amount of Cleveland's attorney's fee.

/s/_____
Judge Nelson

APPENDIX L

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 28, 2005]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY GRANTING DEFENDANT CITY OF CINCINNATI'S MOTION FOR PARTIAL DIRECTED VERDICT, DENYING DISMISSAL OF EQUAL PROTECTION CLAIM, WITHHOLDING JUDGMENT ON DEFENDANT VALLEY'S 41(B)(2) MOTION, AND NOTING STIPULATION THAT REMAINING ISSUES ARE TO BE DETERMINED BY THE COURT WITHOUT A JURY

For the reasons expressed on the record of today's date, the Court grants Defendant City's Motion For A Directed Verdict solely on the issues of lost profit and bid preparation cost.

The Court denies Defendant City's Motion for dismissal of Plaintiff's equal protection claim relating to the administration of the contract at issue in this case.

The Court defers a ruling on Defendant Valley's motion to dismiss under Rule 41(B)(2) and will withhold judgment on such issues until the close of all evidence.

All parties having stated that the remaining issues in this action are appropriate for determination by the Court alone without jury verdict, the jury is discharged with the consent of all parties with regard to all issues remaining in this action. The case will proceed as a trial to the bench with regard to Plaintiff's claims for declaratory and injunctive relief and attorney fees.

SO ORDERED.

/s/
Fred Nelson, Judge

APPENDIX M

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 20, 2005]

Cleveland Construction, Inc.,	)
Plaintiff,	)
	)
v.	)
	)
City of Cincinnati, et al.,	)
Defendants.	)
	)

ENTRY

Pursuant to Civil Rule 65(B)(2) and previously determined with the parties as reflected on the Amended Case Scheduling Order of October 8, 2004, the hearing on Plaintiff's request for preliminary injunctive relief is combined with the trial on the merits of the case as scheduled to begin on June 20, 2005.

SO ORDERED.

/s/
Judge Nelson

APPENDIX N

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A0402638

[Filed May 13, 2005]

Cleveland Construction, Plaintiff,	)
vs.	)
City of Cincinnati, et al., Defendants.	)

ENTRY DENYING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INJUNCTIVE RELIEF

Introduction

This matter comes before the court on the motion of Plaintiff Cleveland Construction, Inc. ("Cleveland") for partial summary judgment and for injunctive relief, and countervailing motions for summary judgment by Defendants the City of Cincinnati ("the City") and Valley Interior Systems, Inc. ("Valley," which has associated itself with the City's legal position for purposes of its motion). The court in

keeping with the requests of the parties conducted a nonevidentiary hearing on the motions, and has reviewed the arguments of counsel, the pleadings and briefs, and the evidence filed of record.

The case involves a dispute related to drywall work needed for the expansion and renovation of Cincinnati's Convention Center. The parties agree that in a second round of bidding to perform the drywall work, Cleveland offered to do the job for $8,889,000 and Valley submitted a bid of $10,135,022. Although Cleveland's bid was lower than Valley's by roughly one and a quarter million dollars, the City awarded the drywall contract to Valley as the lowest bidder that met the City's Small Business Enterprise program ("SBE") criteria. The City states that Valley got the contract because it was prepared to make greater use of small business subcontractors than could Cleveland.

Cleveland subsequently filed this lawsuit, alleging among other matters that the City's SBE program "is a sham to allow the City to use racial and gender-based quotas illegally," and asserting that in awarding the contract to Valley, the City violated Cleveland's equal protection rights and ignored its own municipal code in violation of due process. After a hearing at which this court denied Cleveland's motion for a temporary restraining order, Defendants removed the case to federal court; in due course, the action was remanded here, the court dismissed certain individual defendants, and the parties engaged in extended discovery. Cleveland elected not to pursue application for a preliminary injunction until the filing of the instant motions, which include the summary judgment issues to which the court now turns.

Summary Judgment Standard

Summary judgment is appropriate when it is clear from the facts established in the pleadings and evidential materials of record, as viewed in the light most favorable to the party or parties opposing the motion, that: "(1) no genuine issue of fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion." *See, e.g., Sauter v. One Lytle Place* (1st Dist. App. 2005), 2005-Ohio-1183, citing Civil Rule 56(C). If a party seeking summary judgment meets its initial burden of identifying a basis for the motion together with those parts of the record that "demonstrate the absence of a genuine issue of material fact on the essential element(s) of the ... nonmoving party's claims ...., the nonmoving party then has a reciprocal burden ... to set forth specific facts showing that there is a genuine issue for trial ...." *Dresher v. Burt* (1996), 75 0hio St.3d 280, 293.

Equal Protection Issues

At this stage in the litigation, Cleveland argues that the City's SBE program as designed (to include certain "Rules and Guidelines") and as applied here amounts to a race-conscious awards scheme that the City cannot justify under prevailing constitutional norms. (Plaintiff at this point does not argue that the City has required improper considerations of gender, perhaps because Valley's successful bid did not reflect subcontracting percentages for women-owned firms that approached the City's availability estimates.) The City is frank to respond that it lacks a factual predicate that could satisfy "strict scrutiny" review of a race-conscious program, but argues that its SBE approach as designed and as

undertaken here is race-neutral, rationally based, and constitutionally unexceptionable. The record as presented to date reflects genuine issues of material fact that preclude summary judgment for any side on this part of the dispute.

The City's municipal code provides that "Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ... services ...." Cincinnati Municipal Code ("Code") at 323-7(a). The Code defines a Small Business Enterprise with regard to gross revenues and number of employees; the SBE definition itself does not include factors of race or gender. Code 323-1 -S. The record here may suggest that the City pursues the 30% SBE goal on a project by project basis, establishing different percentages for different project components in order to arrive at the overall 30% figure. The parties agree that with regard to the drywall element of the Convention Center project, the goal was that 35% of subcontracting dollars go to SBEs. *See also, e.g.*, Small depo. at Ex. 5 (City's "Subcontracting Outreach Program Summary" sets Drywall "Goal[ ] For Bid Package C" at 35%).

Standing alone, that SBE goal does not on its face implicate any considerations of race or gender, and the court does not understand Plaintiff to argue that a program undertaken to ensure participation of small businesses is subject to heightened scrutiny simply because it may have the ancillary effect of broadening participation for people in groups as defined by race or gender. Plaintiff argues, however, that the program must be assessed in light of 'Minority Business Enterprise/Women's Business Enterprise' "participation goals of 30% [for] construction ... services [,to be] monitored, tracked internally, and reported annually to city council along with annual SBE participation rates," as also established in Code 323-7(a), and in light both of

"availability estimates" provided by the City to reflect percentages of minority and female controlled subcontractors available for hire in the region, and of SBE "Rules and Guidelines" that imply or direct a race-conscious focus for the program. The City responds that this project, by its terms, involved only SBE goals; that availability estimates, in and of themselves, do not establish any particular hiring requirements; and that the Rules and Guidelines never were officially promulgated and have not been applied, at least in full, to this project.

It is undisputed that in the course of the bidding process, the City was asked why it had provided prospective bidders with an "Availability Estimation Sheet ... Subcontractor Outreach Program (CMC 323-31) noting availability estimates for drywall subcontractors of "13.09% Minority" and "1.05% Female." *See* Amended Complaint at Ex. B and City's MSJ at page 8. The inquiry, disseminated along with the answer to all prospective bidders, continued: "I thought this project only deals with SBEs. Please clarify." The City responded: "This project does deal with SBEs. However, the City of Cincinnati's Disparity Study found that Minorities and Females were underutilized in city contracting projects. .... The minority and female business owner would also have to be certified with the City as a Small Business Enterprise. If the availability estimates are not met, it does not mean that the bid will be deemed non-responsive. However, we expect the utilization of SBEs to be reflective of the availability estimates." Amended Complaint at Ex. H; City's MSJ at 8.

The City submits that this arguably rather opaque answer demonstrates that the drywall bids were governed exclusively by SBE considerations without regard to MBE/WBE concerns. The City points, also, to evidence indicating that a first round of bidding resulted in no contract award because

Valley, while exceeding the MBE availability estimate, did not satisfy the 35% SBE goal. The City further notes testimony of its representatives to the effect that availability estimates did not factor into its bid evaluation, and argues that a stated desire to calculate and track project participation by race does not itself trigger strict scrutiny under such precedent as *Reed v. Agilent Technologies,* 174 F. Supp. 176 (D. Del. 2001). The City, in short, cites to testimony of its representatives that Cleveland was disqualified because it did not meet the 35% SBE goal, and that considerations of race simply did not enter into the determination. *See, e.g.,* purchasing agent Franklin depo. at 46; Ranford at 68 ("when I looked at a bid I did not look at the availability estimation, all I was concerned about was Small Business Enterprise").

Cleveland contends that the City's answer on the relevance of availability estimates should not be construed as advising bidders that the City will not consider race or gender in evaluating bids. Moreover, Cleveland points to Valley's certification of MBE percentages in its winning Subcontractor Utilization Plan, to language in the required Statement of Good Faith Efforts (form 2007, certifying use of any "methods to obtain the maximum practicable participation by small, minority and women-owned business enterprises"), and to language in the Subcontracting Program Outreach Summary stating that "[b]idders should be able to include minority and female firms at the level of availability indicated." *See, e.g.,* Strawser depo. ex. 3; Small depo. ex. 5.

Moreover, Cleveland emphasizes a document titled: "City of Cincinnati/Small Business Division/Office of Contract Compliance/Small Business Enterprise Program/Rules and Guidelines." *See* Townsend depo. ex. 19. That document recites, among other things, that "[i]f ... evaluation

determines that a bidder has failed to achieve levels of minority and women business enterprise participation as might be reasonable on the basis of objective data regarding availability and capacity of such businesses, the bidder shall be subject to an inquiry by the Office of Contract Compliance." Furthermore, the document states, that Office is to examine bid forms to determine "the amount of the subcontracts awarded to minority and women-owned businesses .... If the bidder's utilization is the same as or greater than the actual availability percentage, then the city can accept the bidder's utilization as being in compliance with the program. The burden is on the bidder to explain the low utilization percentage. If the contract administrator determines that the contractor under-utilized minority and/or women-owned businesses based on the actual availability percentage, and that the bidder's good faith efforts were inadequate and there is no legitimate explanation for the under-utilization, then the matter is turned over to the investigative unit for a discrimination investigation." Townsend depo. ex. 19 at 6, 45-46.

For the purposes of these motions, the City does not really argue that such provisions in the "Rules and Guidelines" document are permissible as mechanisms to prevent intentional discrimination by contractors. Rather, the City contends that "[t]he Rules and Guidelines ... were never signed by the City Manager and do not have the force of law," and that "certain portions of the 'Rules and Guidelines' have not been used" in the bid solicitation and evaluation process. *See* City's memo opposing Plaintiff's MSJ at 13; *see also* Lemmie depo; Ranford depo. at 68, 70-73 (City engaged in no evaluation of MBE participation).

Code section 323-31 instructs the City Manager to promulgate rules and regulations for the SBE Subcontracting

Outreach Program; the City Manager, however, has testified that, "I have not promulgated rules and regulations under this section." Lemmie depo. at 10. The City also notes that there is no evidence in the record that the Rules and Guidelines document was made available or known to any bidder prior to the award of the contract at issue; that is, the current record does not reflect that the document directly could have caused any bidder to take race into account in submitting a proposal. The City in effect disavows any problematic portions of the document by arguing that those sections never have controlled the policy of the City or its contractors. On the state of the record to date, that appears to be a genuine issue of material fact (although the court does observe that the City has admitted that the Rules and Guidelines "are ... part of the Small Business Enterprise Program," *see* City's Response to Interrogatory 17(D) at 6).

Viewing the evidence in the light most favorable to the non-moving party, and given that the Rules and Guidelines document was prepared for and available to City staff, and served to some extent as "working documents used by staff," Lemmie depo. at 11 and Stark depo. ex. 6, (and considering, too, presumptions of regularity that generally inform review of governmental actions), the court cannot conclude for summary judgment purposes that the principles embodied in the Rules and Guideline document played no part in the determinations at issue here. By the same standard, with all reasonable inferences drawn in favor of the Defendants in evaluating Cleveland's summary judgment motion, the court cannot find as a matter of undisputed fact that certain sections of the Rules and Guidelines cited above entered into the City's decision. The status of the "Rules and Guidelines," and the issue of to what extent and effect, if any, they were used here or may support other reasonable inferences regarding Cleveland's claim that the SBE program is run as a "sham"

to mask a race-conscious awards program, remain questions of arguably material fact.

In light of the City's response to the bidder inquiry about the relevance of availability estimates, viewed in conjunction with the bid documents and Code mandates and the Rules and Guidelines document, and the testimony of City officials, the court similarly concludes under the summary judgment standard that a question of fact remains as to whether the City did intelligibly and accurately communicate to the bidders that this drywall project was to be administered under SBE principles without regard to considerations of race (as Defendants maintain was the case and which Plaintiff strongly disputes). Moreover, the court notes as an aside that the record indicates arguably conflicting testimony regarding the subjective impressions of the bidders on this score.

In short, whether or not the City has engaged here in a race-conscious contracting program of the sort that would require "strict scrutiny" review depends on a determination of facts that remain at issue when reasonable inferences are drawn in favor of the non-moving parties on each of the summary judgment motions. *Cf. Safeco Ins. v. City of White House, Tenn.* (6th Cir. 1999), 191 F.3d 675, 692 ("Outreach efforts may or may not require strict scrutiny" [citing authority that such heightened review "'is generally inapplicable' to outreach efforts that target one race], "But ... where their administration 'indisputably pressures' contractors to hire minority subcontractors [,] courts must apply strict scrutiny").

The City argues, however, that Cleveland lacks standing to pursue its equal protection claims in any event because it did not meet the 35% SBE standard and therefore could not have been awarded the contract regardless of any other

considerations. *Cf. Florida General Contractors v Jacksonville* (1993), 508 U.S. 656 (traceability requirement). The court finds below however, that the City's Code in some instances precludes award of a contract based primarily on SBE Subcontractor Outreach Program considerations where the winning bid is more than $50,000 higher than the bid of an otherwise qualified contractor rejected for not meeting the SBE goal. Under these circumstances, where the City agreed to pay well more than one million dollars extra in order to achieve 35% participation by small businesses in the drywall project, the undisputed facts do not establish for summary judgment purposes that Cleveland would have been out of the running for the award had the City applied its SBE rules in the context of the Code as written. Thus, Defendants' standing argument fails at this point in the process for reasons even beyond Cleveland's contention that the SBE program itself is wholly a sham to mask impermissible race-conscious awards.

The court therefore denies the motions for summary judgment of all three parties with regard to Cleveland's equal protection claims.

Due Process Issues

Defendants concede that Cleveland's bid to perform the drywall work on the City's Convention Center project was $1,246,022.00 lower than Valley's. City's MSJ Memo at 7 ("Valley's bid was for $10,135,022.00 while Cleveland's bid totaled $8,889,000.00"); Valley's MSJ (adopting "all the same grounds" as City). Defendants also affirm that "Cleveland's bid was excluded from consideration because it failed to meet the SBE requirements," City's MSJ Memo at 7, and they point to no other infirmities in Cleveland's bid or capacity to perform the work. *Cf.* Franklin depo. at 21-22,

29, 62, 88 (City purchasing agent believes that all three bidders met non-SBE bid specifications and that those bids were acceptable to the purchasing department; no issues with Cleveland's prior performance).

Code section 321-37, "Bid; Award to Lowest and Best" provides in part:

"(a) Selection of Lowest and Best in Award of City Contracts: Except where otherwise provided by ordinance, the city purchasing agent shall award a contract to the lowest and best bidder. ...

(c) Factors to be Considered: Other factors that the city purchasing agent *may* consider in determining the lowest and best bid include, but are not limited to: [prior performance; prevailing wage history; compliance with nondiscrimination rules; and]

(4) Information concerning compliance with the 'SBE Subcontracting Outreach Program' rules and regulations issued by the city manager pursuant to ... section 323-31.

In the event that the selection of the lowest and best bidder is based primarily upon factors 3 or 4 above, the contract award may be made subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower."

(emphasis added)

Cleveland contends that in awarding the contract to Valley despite the fact that Valley's bid was more than $50,000 higher than Cleveland's (by more than 1.2 million dollars),

the City abused its discretion and thereby deprived Cleveland of a constitutionally protected property interest without due process of law. Defendants argue that Cleveland was not the lowest and best bidder because it failed to reach the SBE goal without regard to Subcontracting Outreach Program rules. *See* City's memo in op. at 22; Valley's memo in op. at 10 ("Code section 321-37 does not apply ... because Cleveland was not an otherwise qualified bidder eligible for consideration under 321-37").

For a property interest in the award of a public contract to inhere, "one must have more than a unilateral expectation; rather, one must instead have a legitimate claim of entitlement to such a contract." *Cleveland Construction, Inc. v. Ohio Department of Administrative Services* (10th Dist. 1997), 121 Ohio App. 3d 372, 394. Thus, "a disappointed bidder to a government contract may establish a legitimate claim of entitlement protected by due process by showing that local rules limited the discretion of ... officials as to whom the contract should be awarded" and that discretion was abused in depriving the bidder of the award. *Id.* at 394-95 (no abuse of discretion found); *see also, e.g., Enertech Electrical, Inc. v. Mahoning Co. Commissioners* (6th Cir. 1996), 85 F.3d 257, 260 ("A constitutionally protected property interest in a publicly bid contract can be demonstrated .... [if a bidder can show] that, under state law, the County had limited discretion, which it abused, in awarding the contract'; no abuse of discretion found); *Peterson Enterprises, Inc. v. Ohio Department of Mental Retardation* (6th Cir. 1989), 890 F.2d 416 ("if the board had limited discretion under local roles as to whom should be awarded the contract ..., then Plaintiff might have a protected property interest in the award if he were the beneficiary of the state law mandate;" no property interest where state guidelines were nonexhaustive); *cf. United of Omaha Life Ins. Co. v. Solomon* (6th Cir. 1992),

960 F.2d 31, 34 ("Michigan ... law neither requires that the lowest bidder be awarded a state contract nor creates a property interest in disappointed bidders on state contracts"); *Cementech, Inc. v. City of Fairlawn* (Ohio 9th Dist. App.), 2005 WL 844948 (disappointed bidder whom jury found had submitted lowest and best bid may qualify for money damages when project is already complete); *but see, Miami Valley Contractors, Inc. v. Montgomery Co.* (2nd Dist. App.), 1996 WL 303591 ("as best we can determine, this jurisdiction has never recognized a constitutionally protected property interest of a disappointed bidder on a public works project"); *Miami Valley Contractors, Inc. v. Oak Hill* (4th Dist. App. 1996), 108 Ohio App. 3d 745, 752 (no abuse of discretion found; "we can find no support for the proposition that a second- or third-place finisher in a lowest and best bidder determination acquires a constitutionally protected property right").

"'The meaning of the term 'abuse of discretion' ... connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude' .... 'Arbitrary' means 'without adequate determining principle; *** not governed by any fixed rules or standard.' .... 'Unreasonable' means 'irrational'." *Cedar Bay Construction, Inc. v. City of Fremont et al.*, 50 Ohio St.3d 19, 22, citations omitted. Moreover, "courts in this state should be reluctant to substitute their judgment for that of city officials in determining which party is the 'lowest and best bidder.' .... [I]n the absence of evidence to the contrary, public officers [and] administrative officers ..., within the limits of the jurisdiction conferred by law, will be presumed ... not to have acted illegally." *Id.* at 21. Discretion for determining the lowest and best bid "'is not vested in the courts and the courts cannot interfere in the exercise of this discretion unless it clearly appears that the city authorities in whom such discretion has been vested are abusing the discretion'." *Id.* at

21 (citation omitted). *See also, e.g., Greater Cincinnati Plumbing Contractors' Association v. City of Blue Ash* (1st Dist. 1995), 106 Ohio App. 3d 608, 613-14 (a Charter city's discretion in accepting lowest and best bid "is similar to the discretion provided under general state law [citing R.C. 735.05]; "Competitive bidding provides for 'open and honest competition in bidding for public contracts and [saves] the public harmless, as well as bidders themselves, from any kind of favoritism or fraud in its varied forms'").

If the bid in the instant case was awarded in violation of the explicit $50,000/10% cap established by 321-37(c)(4), the award would be an abuse of discretion and Cleveland would have a "legitimate claim of entitlement" sufficiently clear to give rise to a due process claim. Violation of that precise standard as established by ordinance would move Cleveland's interest in the contract beyond the "mere 'unilateral expectation'" of receiving the award under a regime in which the relevant ordinance provides non-exhaustive guidelines limiting discretion, *cf. Peterson Enterprise,* 890 F.2d 416; *Cleveland Construction,* 121 Ohio App. 3d at 394, and into that rare context in which a disappointed bidder may assert a constitutionally protected property interest. This is the basis on which Cleveland advances the second part of its motion for partial summary judgment. *See* Motion at 2 (seeking judgment based on an asserted "property interest in the contract"). Under the summary judgment standard, the court thus turns to the question of whether any genuine issue of material fact exists as to whether the City breached its 321-37(e)(4) cap.

The language of 321-37 establishes that "information concerning compliance" with the City's SBE Subcontracting Outreach Program rules and regulations is a "[f]actor" that "may" be considered as the City determines the lowest and best bid. If the lowest and best bid is selected "based

primarily" on that factor, the City may proceed to award the contract "subject to the following limitation: the bid may not exceed an otherwise qualified bid by ten (10%) percent or Fifty Thousand Dollars ($50,000.00), whichever is lower." 321-37(c)(4).

In that context, the phrase "otherwise qualified bid" can reasonably be read only to mean a bid that is qualified except that it is not in "compliance" with the SBE Subcontracting Outreach Program "factor". The bid not selected "primarily" because of the SBE Subcontracting Outreach Program factor must "otherwise" be qualified in order to trigger the required calculation with regard to whether the contract award may be made as selected on that basis.

Cleveland points to legislative history for 321-37 indicating that the City Administration took the position and advised Cincinnati's City Council that the ten-percent/$50,000.00 cap would apply to any purchasing contract affected by SBE compliance issues. Assistant City Manager Rashid Young advised Council's Law and Public Safety Committee on November 25, 2003 that "[w]hat this ordinance allows us to do is be clear about when it is appropriate to award a bid to a SBE compliant [bidder] if they are not the lowest. This ordinance would allow us to award a bid if the bid is $50,000 or less difference away from the lowest bid. .... We had an example where the SBE-compliant bidder was some nine hundred thousand dollars in excess of the lowest bid and ... it didn't make a lot of sense to spend nine hundred thousand dollars more to comply with the regulations of SBE." Young depo. and ex. 1.

By its terms, however, the cap applies specifically (and exclusively) to instances where a higher bid is accepted because of "information concerning compliance with *'SBE*

Subcontractor Outreach Program rules' ... issued ... pursuant to 323-31." Code 321-37(c)(4) (emphasis added). As used in the legislative text, the reference to an "SBE Subcontractor Outreach program" does not appear coextensive with the broader "Small Business Enterprise Program" itself. Thus, for example: Chapter 323 as a whole is titled "Small Business Enterprise Program," while section 323-31 specifically is titled "Subcontracting Outreach Program;" and Section 323-5 directs the City Manager to "issue and enforce regulations to carry out the meaning and purpose of the small business enterprise program authorized by this chapter,'" while Section 323-31 directs the City Manager to "issue and enforce rules and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program, substantially in conformance with the content of Part II, Section I, the 'Legislative Recommendation Report To The City of Cincinnati' dated December 17, 2002, prepared by Griffin & Strong, P,C.."

As Cleveland observes: "A basic rule of statutory construction requires that 'words in statutes should not be construed to be redundant, nor should any words be ignored.' ... No part [of a statute] should be treated as superfluous unless that is manifestly required, and the court should avoid that construction which renders a provision meaningless or inoperative." *D.A.B.E., Inc. v. Toledo-Lucas County Board of Health* (2002), 96 Ohio St.3d 250-256 (citations omitted); *see also* Cleveland's MSJ Motion/Memo at 39. Council enacted 323-31 directing enforcement of regulations for the "SBE Subcontracting Outreach Program" in 2003, while leaving in place the separate 323-5 directive as enacted in 1999 to enforce regulations for the SBE program itself. If the Subcontracting Outreach Program and the overall SBE program were identical, a double instruction on enforcement would be unnecessary and redundant. The specific reference

in 321-37(c)(4) to the SBE Subcontracting Outreach Program thus appears to comprehend something less than the SBE program as a whole (a conclusion strengthened by the structure of Chapter 323).

The distinction between the "SBE Subcontractor Outreach Program" and the overall SBE program may not be terribly complex. The Griffin & Strong Report referenced and to some extent incorporated by Code section 323-31 ("Subcontracting Outreach Program") itself makes clear that "[t]he Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more," except where the City "in advance" specifically waives such requirements. Lemmie Depo. Ex. 2 (December 17, 2002 Griffin & Strong Report at 3, 5). That is also the deposition testimony offered by City representatives. *See, e.g.*, Ranford depo, at 78 ("Those are for contracts that are in excess of $100,000"). That distinction, applying the Subcontracting Outreach Program to contracts in excess of $100,000, both would explain the implication in the Code that the SBE Subcontracting Outreach Program is only a subset of the SBE program overall, and could vindicate the City Administration's representation to Council through Mr. Young that 323-31 would preclude the City from paying, for example, "nine hundred thousand dollars more to comply with the regulations of SBE": it gives a widely applicable meaning to the $50,000/10% cap, while also making clear that the cap applies only to relatively large contracts.

The record before the court further reflects that at least some elements of the SBE Subcontractor Outreach Program were applied to the bids at issue. As City contract compliance officer Ranford has testified: "The Subcontracting Outreach Program was applied to convention center bids. If you have any of those bid documents, you will see the Subcontracting

Outreach Program. Those are for contracts that are in excess of $100,000." Ranford depo. at 78; *see also id.* at 60 ("we had the Subcontracting Outreach Program on all convention center projects and they were in excess of $100,000. So we followed how that worked, the goals. The goals were set."), 83 ("The Subcontracting Outreach Program was used for convention center"), 100 ("Q: "There's a listing of the forms that you reviewed ... for the bidders in this case? A: These were the same documents that were the Subcontracting Outreach Program, yes.").

The record now before the court also reflects that the very bid requirement document that specified the 35% SBE participation figure was headed in all capital letters: "SUBCONTRACTING OUTREACH PROGRAM SUMMARY/CONVENTION CENTER PROJECT." *See, e.g.*, Small depo. ex. 5; Butler depo. ex. 1, tab 4, p.7. That document continued, in part: "SBE GOALS PER TRADE CONTRACT ..., BID PACKAGE C: All bidders are required to meet the goal stated .... Drywall .... 35%." The Outreach Program Summary also stated that the "SBE bidder must clearly indicate on Form 2003 the percentage of work that represents their SBE participation percentage as a Prime related to the completion of the scope of work."

Substantial evidence in the record suggests, too, that the City treated that 35% figure as a mandatory requirement. *See, e.g,* Townsend depo. at 83 ("You're determined not to be in compliance if you did not meet the goal, yes"), 106. Indeed, the City bases its Motion with respect to Cleveland's equal protection claims on the assertion that the SBE goal was mandatory, although Cleveland takes somewhat of a contrary posltaon, *cf.* Cleveland's Reply Memo in support of MSJ at 2, citing prior Townsend testimony. Whereas the rest of the Code relating to SBE matters speaks in terms of goals not

expressed as inflexible threshold requirements, the Subcontracting Outreach Program as referenced in 321-37 and 323-31 "requires bidders to ... achieve a minimum of 20% (which may [be] higher for construction of buildings) SBE subcontractor participation." December 17, 2002 Griffin & Strong Report 7 (noting elsewhere that City can waive requirement in advance under the program). Significantly, at the same time that the Code was amended to include the Subcontracting Outreach Program language (including the cost cap), Council also deleted Code language otherwise requiring bidders to submit (less rigorous) "written assurance of commercially useful SBE participation in their bids" and to make "good faith" efforts to meet SBE participation levels. *See* former Code sections 323-27 and 323-29, as repealed by the same ordinance that established 232-31 incorporating the more mandatory regime of the Griffin & Strong report.

That mandatory approach also is largely consistent with the "Subcontracting Outreach Program" section of the Small Business Enterprise Program Rules and Guidelines that, although not signed by the City Manager, nonetheless provided guidance to City employees in certain respects. *See, e.g.*, Townsend depo. ex. 19 ("Rules and Guidelines") at 9 ("Subcontracting Outreach Program, CMC 323-31: The Subcontracting Outreach Program applies to City-funded construction contracts of $100,000 or more. At the City's sole discretion, these requirements may be waived in advance .... The Subcontracting Outreach Program requires bidders to ... achieve a minimum of 20% [which may be higher for construction of buildings] SBE subcontractor participation. To be eligible for award of this project, the SBE bidder must subcontract a minimum percentage of its bid to ... SBE subcontractors"); *see also* Lemmie depo. at 11 ("Rules and Guidelines" were "working documents used by staff in the office"); Ranford depo. at 78, 80 and ex. 34 and G ("Rules

and Guidelines" page 10, Subcontracting Outreach Program with regard to coverage of projects over $100,000 and mandatory nature of SBE figures was used for contract compliance review in convention center program, whereas Nondiscrimination MBE sections of Rules and Guidelines were not). The court observes, however, that Cleveland's position that "the City has ... decided that good faith efforts [to achieve SBE compliance] do not matter and does not look at them," Cleveland's MSJ Memo at 33, argues that certain elements of the Subcontracting Outreach section of the Rules and Guidelines were disregarded in pursuit of higher SBE figures, *see* Ranford depo. ex. G at 11 (good faith exceptions).

The City Manager's failure formally to promulgate rules and regulations for the Subcontracting Outreach Program under 323-37, of course, can provide no justification for any failure to abide by the $50,000/10% cost cap established by 321-37. Code 323-31 *requires* the issuance of such rules: "The City Manager *shall issue* roles and regulations to carry out the meaning and purpose of the Subcontracting Outreach Program...." Failure to provide required regulations may compound an abuse of discretion; it does not mitigate such an abuse. *See, e.g., City of Dayton, ex rel. Scandrick v. McGee,* 67 Ohio St.2d 356, 360 (1981) ("The presence of standards against which such discretion may be tested is essential; otherwise, the term 'abuse of discretion' would be meaningless"); *cf.* Lemmie depo. at 11 ("[a]t this time we have no plans" to issue any SBE rules and regulations other than those cited above as "working documents used by staff.").

Similarly, the City's perhaps unusual approach to legislative drafting - codifying the Subcontractor Outreach Program through statutory references to a consultant's report,

rather than by direct recitation of standards and requirements - cannot permit the City to ignore the cost cap that Council did specifically enact in 321-37. Had the legislative recommendations concerning the Subcontractor Outreach Program as set forth in Part II, Section I of the Griffin & Strong report referenced in 323-31 been adopted in a more straightforward fashion, the connection between the Subcontractor Outreach Program and a generally required SBE figure of 20% or higher would be more publicly visible. That connection is not nullified simply because it may be obscured by the indirect approach of the Code.

Code section 321-37(c)(4) envisions that "[i]nformation concerning compliance" with the SBE Subcontracting Outreach Program may be the primary basis for the selection of the lowest and best bidder (in which event, the cost cap applies). Defendants do not dispute that award of the contract to Valley was "based primarily" on "compliance" with the 35% SBE figure set forth in the SUBCONTRACTING OUTREACH PROGRAM SUMMARY. *See, e.g.*, Franklin depo. at 28-29 ("Q: ... do you remember any factor other than SBE compliance that was a primary factor in deciding who got the bid award in this situation? A: No. ....Q: ... do you recall there being any factor that made a difference primarily one way or the other other than the SBE number? A: No."). Although the title of that bid requirements document may not be dispositive, it does not appear to weigh in Defendants' favor.

Defendants plainly have not established that they are entitled to summary judgment on Cleveland's due process claim or on the remaining elements of Cleveland's Amended Complaint.

The closer issue is whether Cleveland is entitled to judgment on the due process portion of its motion. When the evidence is reviewed in the light most favorable to Defendants, as the summary judgment standard requires for this evaluation, the court cannot find that reasonable minds could come only to the conclusion that Cleveland had been divested of a property right in violation of due process of law. A question remains for the finder of fact as to whether the City legitimately designated Valley as the lowest and best bidder based on factors other than information concerning compliance with the Subcontracting Outreach Program. That is, an arguable question of fact remains as to whether the 35% SBE figure invoked by the City derived from the Subcontracting Outreach Program itself (with its generally mandatory 20% SBE threshold) or from efforts by the City on top of the Subcontractor Outreach Program to approach the overall 30% SBE goal contained elsewhere in the Code.

The City's 30% SBE goal was created prior to the Subcontractor Outreach Program and continues in effect today in a Code section separate from that containing the Subcontractor Outreach Program. Code 323-7 ("The city of Cincinnati's Annual Goal for SBE participation shall be 30% of the city's total dollars spent for construction ..."). The parties have not specifically identified in their briefing the particular genesis of the 35% drywall SBE figure that was used for Convention Center bids, and the court does not find the facts on that matter established beyond peradventure. That the Subcontracting Outreach Program applies to contracts over $100,000 and generally requires at least 20% SBE participation need not necessarily mean to a finder of fact that the higher goal of 30% SBE participation stated elsewhere in the Code could not have provided a sufficiently distinct basis for the City's evaluation.

The facts do make clear that the City insisted upon a re-bid after the initial bidding round in which Valley came very close to but did not meet the 35% figure (while very considerably exceeding the 20% level designated by the Subcontracting Outreach Program); in the end, Valley achieved 40% SBE participation to Cleveland's 10% -- a difference of 400%. The record also includes testimony that the Convention Center project is the only recent City project for which SBE goals were set at higher than the 20% Subcontractor Outreach figure. *See* Ranford depo. at 84.

The City has broad discretion to determine what constitutes the lowest and best bid. *See* 321-37; 321-65 (award to the "most advantageous" offeror, "taking into consideration price and evaluation factors set forth in the request for proposals"; here the contract was awarded on "lowest and best" basis); *cf. Cedar Bay Construction,* 50 Ohio St.3d at 21. Construing all the facts in the light most favorable to the Defendants for summary judgment purposes, the court determines that a reasonable finder of fact could decide that the cost cap provision is not triggered because the City arrived at its award for reasons substantially enough beyond the Subcontracting Outreach Program as to make "information concerning compliance" with that program something less than the primary basis for the award. That is an issue for trial next month.

The court therefore denies all motions for summary judgment in this matter.

Cleveland's Motion for Injunctive Relief

The court at this time will deny Cleveland's motion for injunctive relief pending trial. The parties' desires with regard to the scheduling of this case have been solicited on a regular basis. After the action was removed to and returned from federal court, Cleveland opted not to seek a prompt hearing on preliminary injunction, but sought rather to engage in the extended discovery reflected in the voluminous materials relating to the summary judgment motions. Cleveland then waited to the final day of the dispositive motion period -- almost one year after the action was filed and roughly three months prior to the scheduled June 20, 2005 trial date—to pursue its preliminary injunction request.

Moreover, Cleveland has provided no evidence whatsoever to meet its burden of proving (by clear and convincing evidence) various elements required to win injunctive relief. For example, the court has been presented with no evidence, apart from the McKillip affidavit provided by the City, as to the current status of the Convention Center drywall project, the equitable balance of harms among the parties, and important factors affecting the public interest. The trial date now is not much more than one month away; the evidence adduced there surely will help inform any decisions with regard to injunctive relief. The court in the exercise of its equitable powers will await that necessary information as presented by the parties in an orderly manner at trial.

SO ORDERED

/s/ _____
Fred Nelson,
Judge

cc: Kelly Lundrigan, 225 West Court Street, Cincinnati, OH 45202 (fax: 721-4268)

Leonard Weakley, Jr., One West Fourth Street, Suite 900, Cincinnati, OH 45202 (fax: 381-9206)

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APPENDIX O

COMMON PLEAS COURT
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed February 25, 2005]

Cleveland Construction, Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY ON CITY'S MOTION FOR A PROTECTIVE ORDER

After a hearing was held in Chambers, Defendant City's Motion for a Protective Order is denied in that the City through counsel and Plaintiff's counsel will draft an agreed order proposing the terms and conditions under which the Darraugh Butler database will be provided to Plaintiff's counsel solely for use in this action. The City's motion regarding SBE files not related to the convention center project is moot, as Plaintiff withdraws its request for such documents.

/s/_____
Judge Fred Nelson

/s/ W. Kelly Lundrigan Attorney	0059211 Atty for Plaintiff
/s/Christopher J. Aluotto Attorney	0059556 Attny for City of Cincinnati
/s/David L. Barth	0025169 Atty for Valley Interior Systems, Inc.

APPENDIX P

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO: A0402638

[Filed June 16, 2004]

Cleveland Construction, Inc., Plaintiff,	)
v.	)
City of Cincinnati, et al., Defendants.	)

ENTRY DENYING PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

This matter, having come before the Court for a hearing on Plaintiff's Motion for Temporary Restraining Order on March 31, 2004, and the Court being fully advised and having heard arguments as to the merits therein, this Court hereby **DENIES** Plaintiff's Motion.

IT IS SO ORDERED.

/s/
Hon. Frederick D. Nelson, Judge

Have Seen and Agreed To:

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per Kelly Lundrigan's telephone authority
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